

INDIANA LAW REVIEW

2008 SURVEY OF RECENT DEVELOPMENTS IN INDIANA LAW

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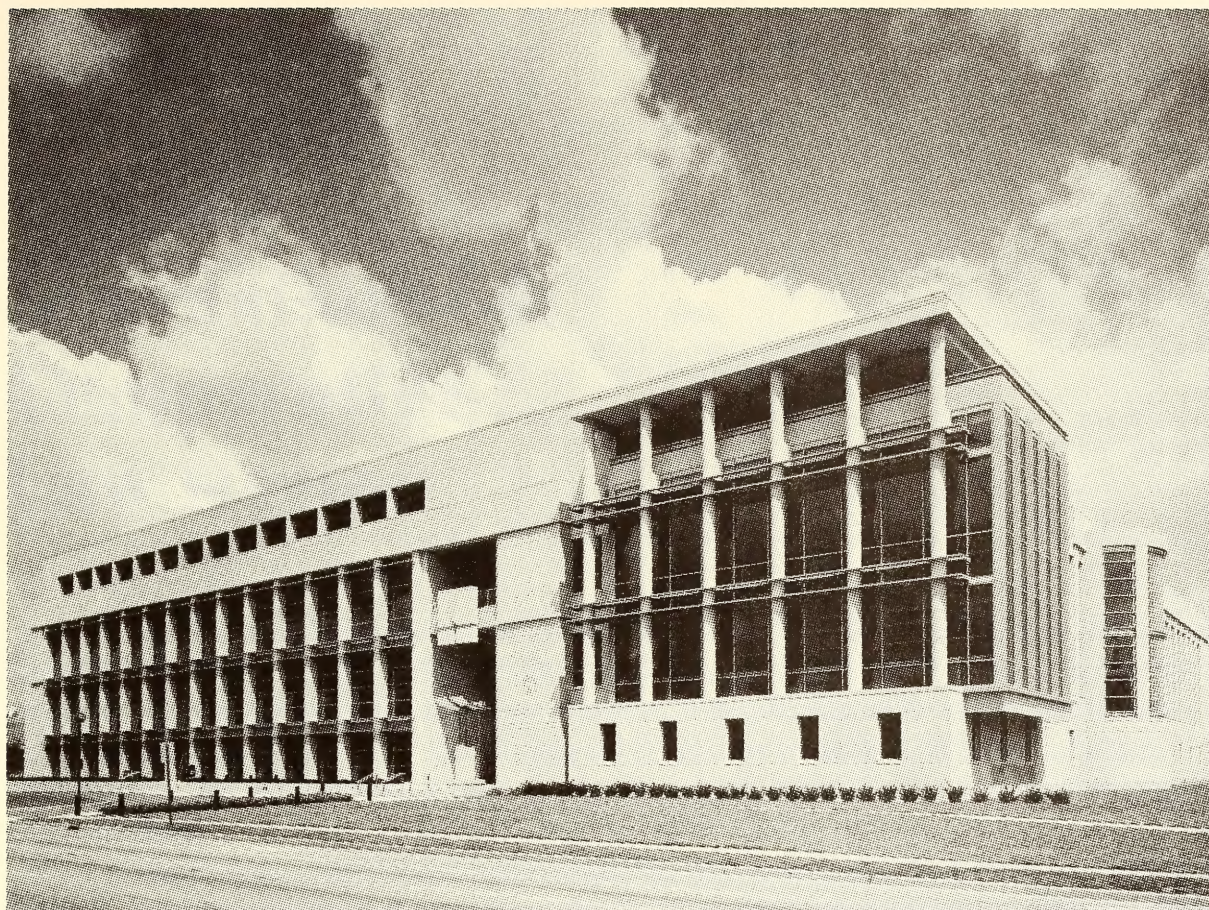
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THE CHANGING NATURE OF JUDICIAL LEADERSHIP

RANDALL T. SHEPARD*

When we think about leadership in the legal profession, the work of lawyers and, particularly, the work of bar associations come most often to our mind. We have tended to think of leadership in the judicial sense by reference to the cases decided or the jurisprudence developed by individual judges through the decisions of appellate tribunals.

In the twenty-first century, the judicial members of the legal profession have begun to view leadership in ways beyond the jurisprudence that flows from individual cases. Increasingly, judges have been taking responsibility for the overall health of the judicial institution and for its effectiveness at dispensing substantial justice in the society that relies on us for doing that.

This essay focuses on ways in which leadership occurs in the modern or recent judiciary, as a way of exploring how we might go about building stronger institutions and a more effective system of justice. I will do that by examining four dimensions of modern judicial leadership.

I. PUTTING THE INSTITUTION ON THE LINE

To be sure, there are occasions when the demand for extraordinary judicial leadership arises in the context of litigation. The leading example is a very familiar story about a moment in history. The 1954 decision in *Brown v. Board of Education (Brown I)*¹ is rightly regarded as the seminal event in the nation's great civil rights era. Anyone with more than a passing knowledge of *Brown I* knows about the central role of the remarkable litigation team led by Thurgood Marshall and his associates at the NAACP. Those lawyers developed just the right case and chose just the right moment.

The Supreme Court, of course, overruled *Plessey v. Ferguson*² and held that separate could not possibly be equal.³ It ordered schools to be de-segregated in dozens of states, including the northern state of Kansas that gave the case its caption.⁴ We think of the *Brown I* moment in American history as one of the great counter-majoritarian judicial acts.

To be sure, the lawyers were crucial to the event, but so were the members of the Supreme Court and, particularly, the Court's leader, Chief Justice Earl Warren. Many people can still remember and very occasionally still see barns painted with "Impeach Earl Warren" as a result of this decision. Contemplate for a moment why it mattered so much that Chief Justice Warren managed to

* Chief Justice of Indiana. A.B., 1969, Princeton University; J.D., 1972, Yale Law School; LL.M., 1995, University of Virginia School of Law. I thank Dean Gerald L. Bepko of Indiana University for prompting me to put these thoughts in print.

1. 347 U.S. 483 (1954).

2. 163 U.S. 537 (1896).

3. *Brown I*, 347 U.S. at 494-95.

4. *Id.* at 495; *see also* *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294, 300-01 (1955) (ordering that schools desegregate).

engineer a unanimous decision in *Brown*.⁵ It was not at all preordained that this would occur. Diaries and notes revealed long afterwards indicate that there was every chance that the case would have been decided on the basis of a very divided vote.⁶ It was the political savvy of former Governor Warren that managed to produce a unanimous decision.⁷ It speaks the obvious to say that the fact that the decision was unanimous made all the difference in the world as respects how *Brown v. Board of Education* would be received by the public and how it would be enforced. It helped enormously, of course, that President Eisenhower ultimately sent the 101st Airborne Division to Little Rock to enforce the order of the Supreme Court. It was a skillful choice made by a President who knew that the public remembered the 101st for its heroic deeds during World War II. He knew that Americans would respond better to the sight of heroes on duty to enforce the rule of law.⁸ One need only pause but briefly to imagine what the aftermath of the *Brown* decision might have been like had the Supreme Court decided the case on a divided vote with accompanying concurrences and dissents.

One might make a similar point about the case involving President Richard M. Nixon and the Watergate tapes. We have known for a long time that Chief Justice Warren Burger, realizing that the case would go against the very President who had placed him in the nation's highest judicial office, worked every day, two weeks straight, to assemble an opinion that might command unanimity.⁹ He had taken the assignment himself, and his commitment to a unanimous decision was so strong that he ended up issuing an opinion that did not actually reflect his own legal views about why the President should lose the case.¹⁰ President Nixon had contemplated not complying if he lost,¹¹ perhaps following Andrew Jackson's approach as respects the Cherokees. When his chief of staff told him the Court's opinion was "tight as a drum," Nixon decided to turn

5. See Melvin I. Urofsky, "Among the Most Humane Moments in All Our History": *Brown v. Board of Education in Historical Perspective*, in *BLACK WHITE, AND BROWN: THE LANDMARK SCHOOL DESEGREGATION CASE IN RETROSPECT* 1, 25 (Clare Cushman & Melvin I. Urofsky eds., 2004).

6. See EARL WARREN, *THE MEMOIRS OF EARL WARREN* 281-86 (1977); see also John D. Fassett, *A Plea for the Demise of a Stubborn Myth*, in *BLACK, WHITE, AND BROWN: THE LANDMARK SCHOOL DESEGREGATION CASE IN RETROSPECT* 117, 123-27 (Clare Cushman & Melvin I. Urofsky eds., 2004).

7. See Urofsky, *supra* note 5, at 20-21, 26.

8. President Eisenhower's actions stood in marked contrast to Andrew Jackson's response to the Supreme Court's ruling on discrimination against the Cherokees. Jackson's modern fans express skepticism that he actually said, "John Marshall has made his decision, now let him enforce it." What is important, however, is that President Jackson did not in fact enforce the Court's decision. See JOHN MEACHAM, *AMERICAN LION: ANDREW JACKSON IN THE WHITE HOUSE* 203-04 (2008).

9. See BOB WOODWARD & SCOTT ARMSTRONG, *THE BRETHREN: INSIDE THE SUPREME COURT* 310-46 (1979).

10. For an early but fulsome account of these events, see *id.* at 287-347.

11. *Id.* at 347.

over the tapes.¹²

While we have not experienced any of these titanic moments on a national level in recent decades, it is easy enough to identify occasions when various state courts confronted similar dynamics under important circumstances. Perhaps the most prominent illustrations are the school finance cases brought in states like Ohio,¹³ Kentucky,¹⁴ and Texas.¹⁵ In each of these, litigants asked the state supreme court to determine that the existing method of financing education did not comply with guarantees contained in the state constitution, guarantees quite common in state constitution but without any analog in the Constitution of the United States.¹⁶ Among the significant features of these cases was the continued volley back and forth between the political branches of those states and the state's highest court, as legislators and governors sought out solutions that might be held satisfactory by a majority of the state supreme court.

Indiana's recent moment of great tension was the challenge to Secretary of State Evan Bayh's candidacy for Governor on the basis that he had not been a resident of the state long enough to qualify under the Indiana Constitution.¹⁷ A court of four Republican justices and one Democrat voted unanimously that Evan Bayh met the legal standard.¹⁸ To his credit, the sitting Governor of the State,

12. *Id.*

13. *DeRolph v. State*, 677 N.E.2d 733, 737 (Ohio 1997) (finding that the school financing system violated state constitutional guarantee of a "thorough and efficient system of common schools").

14. *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 215 (Ky. 1989) (finding that the existing school system did not provide "an efficient system of common schools" as required by the state constitution).

15. The Texas Supreme Court appears to hold the record for decisions invalidating school finance arrangements. For the latest of these, see generally *Neeley v. West Orange-Cove Consolidated Independent School District*, 176 S.W.3d 746 (Tex. 2005).

16. For these state constitutional provisions, see ALA. CONST. art. XIV, § 256; ALASKA CONST. art. VII, § 1; ARIZ. CONST. art. XIV, § 1; CAL. CONST. art. IX, § 5; COLO. CONST. art. IX, § 2; CONN. CONST. art. VIII, § 1; DEL. CONST. art. X, § 1; FLA. CONST. art. IX, § 1; GA. CONST. art. VIII, § 1, ¶ 1; HAW. CONST. art. X, § 1; IDAHO CONST. art. IX, § 1; ILL. CONST. art. X, § 1; IND. CONST. art. VIII, § 1; IOWA CONST. art. 9, 2d, § 3; KAN. CONST. art. VI, § 1; KY. CONST. § 183; LA. CONST. art. VIII, § 1; ME. CONST. art. VIII, pt. 1, § 1; MD. CONST. art. VIII, § 1; MASS. CONST. pt. 2, ch. 5, § 2; MICH. CONST. art. VIII, § 2; MINN. CONST. art. XIII, § 1; MISS. CONST. art. VIII, § 201; MO. CONST. art. IX, § 1(a); MONT. CONST. art. X, § 1; NEB. CONST. art. VII, § 1; NEV. CONST. art. XI, § 2; N.H. CONST. pt. 2, art. LXXXIII; N.J. CONST. art. VIII, § 4, ¶ 1; N.M. CONST. art. XII, § 1; N.Y. CONST. art. XI, § 1; N.C. CONST. art. IX, § 2; N.D. CONST. art. VIII, § 2; OHIO CONST. art. VI, § 2; OKLA. CONST. art. XIII, § 1; OR. CONST. art. VIII, § 3; PA. CONST. art. III, § 14; R.I. CONST. art. XII, § 1; S.C. CONST. art. XI, § 3; S.D. CONST. art. VIII, § 1; TENN. CONST. art. XI, § 12; TEX. CONST. art. VII, § 1; UTAH CONST. art. X, § 1; VT. CONST. ch. 2, § 68; VA. CONST. art. VIII, § 1; WASH. CONST. art. IX, § 2; W. VA. CONST. art. XII, § 1; WIS. CONST. art. X, § 3; WYO. CONST. art. VII, § 1.

17. *State Election Bd. v. Bayh*, 521 N.E.2d 1313, 1314 (Ind. 1988).

18. *Id.* at 1314-18.

Robert D. Orr, responded to the court's decision by saying that he was pleased the issue had been put to rest. Surely his reaction and the reaction of others would have been different had there been a divided vote.

At junctures such as these, the rectitude and authority of the judiciary is plainly on the line. Judicial leadership requires assessing the court's role in the larger context of democratic self-government, weighing its destiny as against the other mechanisms of self-government, and moving in a wise direction.

II. BUILDING THE INSTITUTION

Perhaps eighteen months ago at a small dinner of chief justices and state court administrators held in Cambridge, Massachusetts, Chief Justice Margaret Marshall invited those around the table to think for a moment about "who was a great Chief Justice of the United States," limiting the choices to three possible answers: Earl Warren, Warren Burger and William Rehnquist. She asked each of us to cast but one vote. The largest number of votes went to Earl Warren, with William Rehnquist running a respectable second, and Warren Burger receiving none. Chief Justice Marshall said this result was typical of other occasions when she had asked the same question, but argued that this division of the house did not fairly credit the contributions of Warren Burger.

She pointed out that Warren Burger had accomplished a great deal to enable the federal judiciary to conduct its work in a modern and effective way. He had much improved relationships between the courts and the Congress, and he had persuaded the legislative branch to approve better budgets for the federal judiciary.¹⁹ This campaign produced better staff and law clerk support and better physical working conditions.²⁰ The great federal court building boom commenced while Burger was Chief Justice,²¹ leading to the phenomenally improved federal court facilities that the nation enjoys today. He likewise inspired creation of the National Center for State Courts, the principle court reform body and innovation vehicle aimed at those courts where most Americans go in search of justice.²²

Efforts of a similar sort by Indiana's trial and appellate court leaders have produced a good many happy results. In the \$100 million or so budget of the Indiana Supreme Court, there are now nearly \$20 million appropriated annually for improvements to the state's trial courts—all the way from revolutionizing the use of technology to upgrading local public defender services to supplying qualified interpreter services in the county courthouses. There is every reason to believe that this trend will continue. Part of this progress has flowed simply from paying attention to the mechanics of how the state budget is assembled and adopted, and part of it is the product of work by judges in educating legislators

19. EARL M. MALTZ, *THE CHIEF JUSTICESHIP OF WARREN BURGER 1969-1986*, at 10-11 (2000).

20. *Id.* at 10.

21. *Id.* at 11.

22. *Id.*

on how additions to the state budget can make justice work better in their own districts.

III. SPENDING CAPITAL ON THE BIG PROJECT

Observing the activities of a state officeholder some years ago, a friend of mine said that the officeholder seemed to be running for something but did not know what it was yet. This was meant to refer to a rather common human trait of accumulating credibility and capital with other people without necessarily knowing when or on what topic one might need to use it.

One usually needs to use it when something really big demands to be done. A very early example of this was the willingness of Chief Justice Taft to commit himself early in the twentieth century to step out of his regular role and lead in creation of the country's first code of ethics for judges.²³ Yet another example was the willingness of Justice Robert Jackson to step out of his role as adjudicator to accept President Harry Truman's entreaty that he become one of the prosecutors at the Nuremburg war crimes trials.²⁴ A third example is the willingness of Earl Warren to serve as chairman of the President's Commission on the Assassination of President Kennedy.²⁵ Indeed, as so often happens, it was Warren as chair who gave the Commission its very name in the minds of most Americans. A much more modest, but similar example was my decision to accept Governor Mitch Daniels' request that I join with former Governor Joe Kernan and others to devise a series of improvements in local government structures and services (including those of Indiana's trial courts). Being careful not to end up violating the Code of Judicial Conduct myself, I asked that the endeavor be organized in a way that did not cross any of those lines.

Each of these reflects a moment when a member of the judicial family is called upon to play roles which are not strictly a part of the classic adjudicative function but reflect instead the exercise of leadership in other ways, like lending a part of the credibility the judicial branch acquires over time to a very important undertaking that society needs. I would be the first to say that these moments must be few and far between, lest they detract from our principal obligations. In the long run, though, they represent a way that judges can sometimes contribute to building a more decent safe and prosperous society.

IV. TRIAL COURT LEADERSHIP

While many of the preceding examples have reflected work of appellate court judges, particularly the work of the leaders of courts of last resort, there are also a host of examples of changes that have been made by trial court judges or members of intermediate appellate courts.

Judge John L. Kellam of the Henry Circuit Court has been an indefatigable

23. See *Final Report and Proposed Canons of Judicial Ethics*, 9 A.B.A. J. 449, 449 (1923).

24. See ROBERT E. CONOT, *JUSTICE AT NUREMBERG* 14 (1984).

25. See generally G. EDWARD WHITE, *EARL WARREN: A PUBLIC LIFE* 190-213 (1984) (discussing Chief Justice Warren's role on the aptly named "Warren Commission").

reformer in a wide variety of fields. He laid out his vision of trial court organization in this law review.²⁶ He set the Indiana court system on a path we still tread today.

In a variety of senses the Chief Judge of the Indiana Court of Appeals, John G. Baker, began his leadership of court reform while serving as a trial judge in the Monroe Superior Court. Most people would say that Judge Baker's leadership of the group of judges in Monroe County was a leading factor in creating a unified court there. Moreover, he and his colleagues proved to other trial judges that this was an effective and convenient way of building better courts at the local level.

Another example is the work Judge William Miller of the Vanderburgh Circuit Court did during the 1980's to create alternatives to incarceration. Judge Miller's activities on drug and alcohol programs, work release, and other corrections methods were very much a forerunner of today's ubiquitous movement we now call "Problem Solving Courts."

I might mention one other trial judge whom I know, Judge Michael Dann, now retired from the courts in Arizona. While a student in the Master of Laws program at the University of Virginia School of Law, Judge Dann chose to examine and formulate ideas for improving the way American courts conduct jury trials. He made proposals on everything from recruiting a representative venire to re-empowering jurors to decide cases in the way that adults actually decide important matters in real life.²⁷ It is not too much to say that Judge Dann's work as a trial court judge in Arizona ultimately spawned a national movement which prompted dramatic changes from Arizona to New York, and of course here in Indiana.²⁸

CONCLUSION

A society's institutions either grow and adapt, or wither and get bypassed. Just as the adjudicating judge long ago ceased being the passive non-manager of litigation, today's judge must take interest and responsibility for building better systems of justice.

26. John L. Kellam, *The Indiana Judicial System: An Analysis of Change*, 21 IND. L. REV. 273 (1988).

27. See generally B. Michael Dann, *Jury Reform: The Arizona Experience*, 79 JUDICATURE 280 (1996) (discussing jury research and reform).

28. See generally Randall T. Shepard, *Jury Trials Aren't What They Used to Be*, 38 IND. L. REV. 859 (2005).

AN EXAMINATION OF THE INDIANA SUPREME COURT DOCKET, DISPOSITIONS, AND VOTING IN 2008*

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Unlike the United States Supreme Court, there is generally no means of predicting how a justice of the Indiana Supreme Court will vote in a given case based on ideological doctrine or political worldview. As this Article has shown over a number of years, there are no clear, predictable voting blocks on the court and no template for determining how a particular justice or group of justices will vote in any particular case or type of case. This lack of voting blocks typically means that the court's statistics in any given year will be driven by the particular cases that come before it during that year. The court's voting statistics therefore can sway in unexpected ways from year to year. In that vein, 2008 was no exception. The court's caseload for 2008 serves as another good example of the lack of ideological voting blocks on the court and the uncertainty that litigants that come before the court can face because of the justice's lack of dogma.

First, the primary lesson practitioners should learn from the swings in the court's voting patterns in 2008 is that they likely cannot predict the result of a case simply because the court granted transfer. It has typically been true that if the court grants transfer, it is likely to reverse. For instance, in 2007 it affirmed only 6.4% of civil transfer cases and reversed all other civil cases. In 2008, this assumption did not hold true. Instead, the court affirmed 20% of its civil transfer cases. In many of these cases, the court appeared to exercise its discretion to take transfer to place its own stamp on an area of law despite the court's agreement with the result reached by the lower courts. The obvious purpose of transfer in these cases was not necessarily to reverse a bad result, but to allow the court to speak on important issues. These cases are an important lesson for practitioners seeking transfer from the court, as they demonstrate that focus on the result

* The Tables presented in this Article are patterned after the annual statistics of the U.S. Supreme Court published in the *Harvard Law Review*. An explanation of the origin of these Tables can be found at Louis Henkin, *The Supreme Court, 1967 Term*, 82 HARV. L. REV. 63, 301-02 (1968). The *Harvard Law Review* granted permission for the use of these Tables by the *Indiana Law Review* this year; however, permission for any further reproduction of these Tables must be obtained from the *Harvard Law Review*.

We thank Barnes & Thornburg for its gracious willingness to devote the time, energy, and resources of its law firm to allow a project such as this to be accomplished. As is appropriate, credit for the idea for this project goes to Chief Justice Shepard. Many thanks to Kevin Betz, who initially developed this article and worked hard to bring it to fruition in years past. The authors also must recognize Donald Glick (Mr. Stephenson's father-in-law) who spent Thanksgiving Day writing the spreadsheet that compiled the statistics.

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below is not the only (or even main) consideration the court will give in exercising its power to grant transfer.

Second, the court's lack of voting blocks means the more sensitive issues that come before the court are addressed with intellectual rigor but do not devolve into the sniping that can often occur in courts of last resort. This is true even when the court ultimately enters a fractured opinion with different justices reaching very different results. For instance, in 2008, the court handed down scores of opinions that addressed questions of first impression on sensitive, divisive legal and social issues. These include issues such as the scope of liability under Indiana's RICO statute;¹ the claimed constitutional right to a court-financed interpreter;² the high-profile, politically tinged dispute regarding the effectiveness of arrests made after merger of the Indianapolis police department with the Marion County sheriff;³ the amount of force a parent may use in disciplining a child;⁴ the scope of premise liability as applied to children;⁵ whether a criminal defendant can waive the right to appeal a discretionary sentence as part of a plea deal;⁶ and whether postings on Myspace.com could amount to harassment and subject a juvenile to a delinquency finding.⁷ In almost all of these cases, at least one justice issued a concurring or dissenting opinion. Although these issues were hotly contested, the tone of the court's opinions never wavered from the statesmanship the justices typically employ.

Third, the lack of voting blocks means the level alignment between the individual justices can experience wild swings from year to year. The justices showed a remarkable lack of agreement in 2008, as only two justices agreed more than 80% of time in civil cases. In 2007, there were only three pairings of justices that agreed with each other *less* than 80% of the time. A similar swing occurred in criminal cases. In 2008, no two justices agreed more than 86% of the time in criminal cases, and several justices agreed less than 75% of the time. However, just one year ago, *every* justice agreed with all others in at least 86% of the time in criminal cases. Perhaps most tellingly, 2008 presented a wild swing in the alignments among the justices when considering both criminal and civil cases together. In 2008, there were only two pairs of justices who agreed in more than 80% of all cases. In 2007, *all* of the justices agreed with all other justices more than 80% of the time for all cases.

The same swings exist when looking at the alignment between individual justices. For instance, in 2007, Justices Sullivan and Rucker were the most aligned in civil cases at 91.4%. In 2008, they were among the least aligned at 78.4%. Similarly, in prior years this Article has commented on the somewhat consistent alignment between Chief Justice Shepard, Justice Boehm, and Justice

1. Keesling v. Beegle, 880 N.E.2d 1202 (Ind. 2008).

2. Arrieta v. State, 878 N.E.2d 1238 (Ind. 2008).

3. State v. Oddi-Smith, 878 N.E.2d 1245 (Ind. 2008).

4. Willis v. State, 888 N.E.2d 177 (Ind. 2008).

5. Kopczynski v. Barger, 887 N.E.2d 928 (Ind. 2008).

6. Creech v. State, 887 N.E.2d 73 (Ind. 2008).

7. A.B. v. State, 885 N.E.2d 1223 (Ind. 2008).

Sullivan in civil cases. That alignment was certainly less apparent in 2008, as Chief Justice Shepard and Justice Sullivan agreed in only 73.1% of cases, their lowest level of agreement in more than five years and the second lowest pairing of justices for 2008. Justices Boehm and Sullivan similarly were not as aligned as they have been in civil cases in prior years. In 2008, they agreed in 76.5% of civil cases, their lowest percentage of agreement since 2002.

These swings in the level of agreement between individual justices can exist even within the same year when comparing criminal and civil cases. For instance, Justices Dickson and Rucker were the most aligned in civil cases in 2008, agreeing 80.4% of the time. However, these same justices voted together only 67.4% of the time in criminal cases in 2008, the *lowest* percentage on the year. The alignment in criminal cases between these two justices has seesawed over the past several years depending on the issues before the court, going from 71.7% in 2006 to a high of 86% in 2007 and now back to a low of 67.4%.

Fourth, the lack of ideological voting blocks is evident in the swings in the number of dissenting and concurring opinions the court hands down. For instance, only 62% of the court’s opinions were unanimous in 2008, down from 74.4% in 2007 and 67% in 2006. That percentage marks a low point since 2003, when the justices were unanimous only 61% of the time. Similarly, 24% of the court’s opinions in 2008 were “split,” meaning a change of a single vote one way or the other would have changed the result. This percentage was a marked increase over 2007 and 2006, where only 12 and 10% of cases were split opinions.

One other important development occurred in 2008 in the form of an appreciable drop in the number of petitions for transfer filed by litigants. In 2008, the number of petitions dropped to 858, almost 100 fewer petitions than were filed in 2007. It is unclear whether this is an anomaly or the start of a trend, but merits watching in future years.

Table A. The number of opinions the Indiana Supreme Court issued rose to 96 in 2008. Since the effects of the change in the court’s jurisdiction began to be felt in 2003 and it could be more selective with its docket, it has averaged 103 opinions per year. In 2007, the number of opinions dipped to 78. Given the spike back to its normal level this year, it is likely that 2007 was an anomaly caused by the particularly complex cases before the court at that time. The court also returned to form as to the number of civil opinions it handed down. In 2007, the court handed down more criminal opinions than civil for the first time since 2002, when many mandatory criminal appeals remained on the docket under the court’s old jurisdictional rules. In 2008, the court returned to form, handing down 52 civil opinions and 44 criminal opinions. That balance was typical for years prior to 2007. Justice Sullivan had the most productive year, handing down the most opinions at 22 (almost a quarter of the court’s opinions.) Chief Justice Shepard followed closely with 21 opinions and Justice Rucker had the least, at nine opinions.

Table B-1. Justices Dickson and Rucker were the most aligned in civil cases and were the only two justices in agreement more than 80% of the time in civil cases.

The next highest percentage was 78.4% of agreement, as Chief Justice Shepard agreed with both Justices Rucker and Boehm at that rate in 2008. Although it was the second highest level of agreement in 2008, this 78.4% of agreement would have been the second and third *lowest* in 2007 and 2006, respectively. Justices Sullivan and Dickson had the least amount of agreement at 67.3%.

Table B-2. Chief Justice Shepard and Justice Boehm were the most aligned in criminal cases at 86.4%. Justice Boehm and Justice Rucker were next with 81.8%. However, Justice Rucker did not agree with any of the other justices more than 73% of the time.

Table B-3. Justices Sullivan and Dickson were the least aligned when considering voting for all cases. The two justices agreed in only 69.8% of all cases, the least amount of alignment between any two justices since 2003, when Chief Justice Shepard and Justice Rucker agreed in only 69.2% of all cases. There are no other instances where two justices agreed in less than 70% of all cases during that time period. The lack of alignment between Justices Sullivan and Dickson is consistent with prior years, as Justices Dickson and Sullivan have been among the least aligned of all justices going back to 2002. In fact, in 2002 and 2007 they were the least aligned in all cases, agreeing in only 75.7 and 83.3% of all cases in those years, respectively.

Table C. The percentage of unanimous opinions dipped from 74.4% in 2007 to 62% in 2008. That is the lowest since 2003, when the justices were unanimous only 61% of the time. Almost all of the separate opinions in these cases were dissents. The justices had 34 dissenting opinions but only three concurring opinions. This development might be part of a trend worth watching. In each of the past three years, the number of concurring opinions has dropped while the number of dissenting opinions rises. For instance, the percentage of cases with concurring opinions has steadily dropped from 9.5% in 2005 to 3% in 2008. Conversely, the percentage of dissenting opinions has gone from 26.2% in 2005 to 34% in 2008. These numbers could indicate either that the justices are less likely to agree in the more complicated cases that come before them or that the justices are understandably more inclined to use their limited time and resources on fleshing out written dissenting opinions than they would be for opinions in which they at least concur in the result.

Table D. The raw number of split decisions was up sharply in 2008, rising to 23. The court only issued 10 and 11 split decisions in 2007 and 2006, respectively. The percentage of the court's opinions that were a 3-2 split spiked as well. In 2008, the court was split in 24% of cases, almost a full quarter of the opinions it handed down. The percentage was 12 and 10 for 2007 and 2006.

Table E-1. While the court affirmed in a high percentage of civil cases, the percentage of reversals for all cases remained steady. The court reversed in 76% of all cases in 2008, as compared to 78% in 2005, 76.3% in 2006, and 74% in 2007. As for criminal appeals, the court reversed in 81.6% of all criminal cases

in which it had granted transfer. This percentage is another area where the court shows some unpredictability. In 2007, the court reversed only 74.2% of criminal cases while in 2006 it reversed 82.1% of them. In 2005, the court went in the opposite direction and reversed only 64.8% of those cases. This variance in the court’s results in criminal transfer cases makes it difficult to predict how those cases will be resolved once transfer is granted and indicates that the results are largely driven by the nature of the cases that come before the court in a given year.

Table E-2. Although the number of petitions for transfer has steadily grown for years, 2008 saw a surprising drop in the number of petitions filed. In 2008, the number of petitions to transfer dropped to 858, almost 100 fewer petitions than were filed in 2007. In fact, the year marked the first time since 2004 that fewer than 900 petitions were filed and was the second lowest total since the court’s jurisdiction changed in 2002. The court granted 16% of the civil petitions filed, which was the highest percentage of civil petitions granted since 2004. It continues to be more difficult to obtain transfer in criminal cases, as the court granted only 8.5% of the criminal petitions filed.

Table F. The Indiana Supreme Court’s cases continue to cover a broad scope of topics, including 23 different areas of law in 2008. As the court of last resort for Indiana state constitutional issues, it is not surprising that state constitutional issues dominate the court’s attention. In 2008, the court addressed the state constitution in 17 different cases, about 18% of its total workload. This is consistent with previous years, as the court has handed down at least 13 opinions addressing state constitutional issues in every year since 2004, when it only addressed those issues in 2 cases. As has been stated in this Article in previous years, the court has a tendency to return to areas of law after not addressing them over a period of years. That was certainly true again in 2008, as the court handed down 9 different cases that reviewed or applied Indiana’s statutes of limitation and repose but had only addressed those topics in a single case in 2004 through 2007. However, in 2003 it handed down four opinions on the statute of limitations and repose. In this vein, one area of law that might be ripe for review are issues associated with the public access to governmental records and meetings, as the court has not handed down an opinion in this area in more than five years.

TABLE A
OPINIONS^a

	OPINIONS OF COURT ^b			CONCURRENCES ^c			DISSENTS ^d		
	Criminal	Civil	Total	Criminal	Civil	Total	Criminal	Civil	Total
Shepard, C.J.	7	12	19	0	1	1	1	4	5
Dickson, J.	10	5	15	0	0	0	4	9	13
Sullivan, J.	12	10	22	0	1	1	6	5	11
Boehm, J.	7	14	21	1	1	2	4	3	7
Rucker, J.	7	3	10	1	0	1	8	2	10
Per Curiam	1	8	9						
Total	44	52	96	2	3	5	23	23	46

^a These are opinions and votes on opinions by each justice and in per curiam in the 2008 term. The Indiana Supreme Court is unique because it is the only supreme court to assign each case to a justice by a consensus method. Cases are distributed by a consensus of the justices in the majority on each case either by volunteering or nominating writers. The chief justice does not have any power to control the assignments other than as a member of the majority. See Melinda Gann Hall, *Opinion Assignment Procedures and Conference Practices in State Supreme Courts*, 73 JUDICATURE 209, 209, 213 (1990). The order of discussion and voting is started by the most junior member of the court and follows reverse seniority. See *id.* at 209-10.

^b This is only a counting of full opinions written by each justice. Plurality opinions that announce the judgment of the court are counted as opinions of the court. It includes opinions on civil, criminal, and original actions.

^c This category includes both written concurrences, joining in written concurrence, and votes to concur in result only.

^d This category includes both written dissents and votes to dissent without opinion. Opinions concurring in part and dissenting in part or opinions concurring in part only and differing on another issue are counted as dissents.

TABLE B-1
VOTING ALIGNMENTS FOR CIVIL CASES^e

		Shepard	Dickson	Sullivan	Boehm	Rucker
Shepard, C.J.	O		39	38	40	40
	S		1	0	0	0
	D	---	40	38	40	40
	N		52	52	51	51
	P		76.9%	73.1%	78.4%	78.4%
Dickson, J.	O	39		35	38	38
	S	1		0	2	3
	D	40	---	35	40	41
	N	52		52	51	51
	P	76.9%		67.3%	78.4%	80.4%
Sullivan, J.	O	38	35		39	39
	S	0	0		0	1
	D	38	35	---	39	40
	N	52	52		51	51
	P	73.1%	67.3%		76.5%	78.4%
Boehm, J.	O	40	38	39		39
	S	0	2	0		0
	D	40	40	39	---	39
	N	51	51	51		50
	P	78.4%	78.4%	76.5%		78.0%
Rucker, J.	O	40	38	39	39	
	S	0	3	1	0	
	D	40	41	40	39	---
	N	51	51	51	50	
	P	78.4%	80.4%	78.4%	78.0%	

^e This Table records the number of times that one justice voted with another in full-opinion decisions, including per curiam, for only civil cases. For example, in the top set of numbers for Chief Justice Shepard, 39 is the number of times Chief Justice Shepard and Justice Dickson agreed in a full majority opinion in a civil case. Two justices are considered to have agreed whenever they joined the same opinion, as indicated by either the reporter or the explicit statement of a justice in the body of his or her own opinion. The Table does not treat two justices as having agreed if they did not join the same opinion, even if they agreed only in the result of the case or wrote separate opinions revealing little philosophical disagreement.

“O” represents the number of decisions in which the two justices agreed in opinions of the court or opinions announcing the judgment of the court.

“S” represents the number of decisions in which the two justices agreed in separate opinions, including agreements in both concurrences and dissents.

“D” represents the number of decisions in which the two justices agreed in either a majority, dissenting, or concurring opinion.

“N” represents the number of decisions in which both justices participated and thus the number of opportunities for agreement.

“P” represents the percentage of decisions in which one justice agreed with another justice, calculated by dividing “D” by “N.”

TABLE B-2
VOTING ALIGNMENTS FOR CRIMINAL CASES^f

		Shepard	Dickson	Sullivan	Boehm	Rucker
Shepard, C.J.	O		36	36	38	31
	S		0	0	0	0
	D	---	36	36	38	31
	N		44	44	44	44
	P		81.8%	81.8%	86.4%	70.5%
Dickson, J.	O	36		32	35	29
	S	0		0	1	0
	D	36	---	32	36	29
	N	44		44	44	43
	P	81.8%		72.7%	81.8%	67.4%
Sullivan, J.	O	36	32		33	31
	S	0	0		0	1
	D	36	32	---	33	32
	N	44	44		44	44
	P	81.8%	72.7%		75.0%	72.7%
Boehm, J.	O	38	35	33		29
	S	0	1	0		1
	D	38	36	33	---	30
	N	44	44	44		44
	P	86.4%	81.8%	75.0%		68.2%
Rucker, J.	O	31	29	31	29	
	S	0	0	1	1	
	D	31	29	32	30	---
	N	44	43	44	44	
	P	70.5%	67.4%	72.7%	68.2%	

^f This Table records the number of times that one justice voted with another in full-opinion decisions, including per curiam, for only criminal cases. For example, in the top set of numbers for Chief Justice Shepard, 36 is the number of times Chief Justice Shepard and Justice Dickson agreed in a full majority opinion in a criminal case. Two justices are considered to have agreed whenever they joined the same opinion, as indicated by either the reporter or the explicit statement of a justice in the body of his or her own opinion. The Table does not treat two justices as having agreed if they did not join the same opinion, even if they agreed only in the result of the case or wrote separate opinions revealing little philosophical disagreement.

“O” represents the number of decisions in which the two justices agreed in opinions of the court or opinions announcing the judgment of the court.

“S” represents the number of decisions in which the two justices agreed in separate opinions, including agreements in both concurrences and dissents.

“D” represents the number of decisions in which the two justices agreed in either a majority, dissenting, or concurring opinion.

“N” represents the number of decisions in which both justices participated and thus the number of opportunities for agreement.

“P” represents the percentage of decisions in which one justice agreed with another justice, calculated by dividing “D” by “N.”

TABLE B-3
VOTING ALIGNMENTS FOR ALL CASES⁸

		Shepard	Dickson	Sullivan	Boehm	Rucker
Shepard, C.J.	O		75	74	78	71
	S		1	0	0	0
	D	---	76	74	78	71
	N		96	96	95	95
	P		79.2%	77.1%	82.1 %	74.7 %
Dickson, J.	O	75		67	73	67
	S	1		0	3	3
	D	76	---	67	76	70
	N	96		96	95	94
	P	79.2 %		69.8%	80.0 %	74.5 %
Sullivan, J.	O	74	67		72	70
	S	0	0		0	2
	D	74	67	---	72	72
	N	96	96		95	95
	P	77.1 %	69.8 %		75.8 %	75.8 %
Boehm, J.	O	78	73	72		68
	S	0	3	0		1
	D	78	76	72	---	69
	N	95	95	95		94
	P	82.1%	80.0%	75.8%		73.4 %
Rucker, J.	O	71	67	70	68	
	S	0	3	2	1	
	D	71	70	72	69	--
	N	95	94	95	94	
	P	74.7%	74.5%	75.8 %	73.4%	

⁸ This Table records the number of times that one justice voted with another in full-opinion decisions, including per curiam, for all cases. For example, in the top set of numbers for Chief Justice Shepard, 65 is the total number of times Chief Justice Shepard and Justice Dickson agreed in all full majority opinions written by the court in 2008. Two justices are considered to have agreed whenever they joined the same opinion, as indicated by either the reporter or the explicit statement of a justice in the body of his or her own opinion. The Table does not treat two justices as having agreed if they did not join the same opinion, even if they agreed only in the result of the case or wrote separate opinions revealing little philosophical disagreement.

“O” represents the number of decisions in which the two justices agreed in opinions of the court or opinions announcing the judgment of the court.

“S” represents the number of decisions in which the two justices agreed in separate opinions, including agreements in both concurrences and dissents.

“D” represents the number of decisions in which the two justices agreed in either a majority, dissenting, or concurring opinion.

“N” represents the number of decisions in which both justices participated and thus the number of opportunities for agreement.

“P” represents the percentage of decisions in which one justice agreed with another justice, calculated by dividing “D” by “N.”

TABLE C
UNANIMITY
NOT INCLUDING JUDICIAL OR ATTORNEY DISCIPLINE CASES^h

Unanimous ⁱ			Unanimous with Concurrence ^j			Opinions with Dissent			Total
Criminal	Civil	Total	Criminal	Civil	Total	Criminal	Civil	Total	
26	34	60 (62.0%)	0	3	3 (3.0%)	16	18	34 (35.0%)	97

^h This Table tracks the number and percent of unanimous opinions among all opinions written. If, for example, only four justices participate and all concur, it is still considered unanimous. It also tracks the percentage of overall opinions with concurrence and overall opinions with dissent.

ⁱ A decision is considered unanimous only when all justices participating in the case voted to concur in the court’s opinion as well as its judgment. When one or more justices concurred in the result, but not in the opinion, the case is not considered unanimous.

^j A decision is listed in this column if one or more justices concurred in the result, but not in the opinion of the court or wrote a concurrence, and there were no dissents.

TABLE D
3-2 DECISIONS^k

Justices Constituting the Majority	Number of Opinions ^l
1. Shepard, C.J., Dickson, J., Sullivan, J.	1
2. Shepard, C.J., Dickson, J., Boehm, J.	6
3. Shepard, C.J., Dickson, J., Rucker, J.	1
4. Shepard, C.J., Sullivan, J., Boehm, J.	6
5. Shepard, C.J., Sullivan, J., Rucker, J.	2
6. Shepard, C.J., Boehm, J., Rucker, J.	1
7. Dickson, J., Sullivan, J., Rucker, J.	2
8. Dickson, J., Boehm, J., Rucker, J.	1
9. Sullivan, J., Boehm, J., Rucker, J.	2
10. Boehm, J., Sullivan, J.	1
Total ^m	23

^k This Table concerns only decisions rendered by full opinion. An opinion is counted as a 3-2 decision if two justices voted to decide the case in a manner different from that of the majority of the court.

^l This column lists the number of times each three-justice group constituted the majority in a 3-2 decision.

^m The 2008 term’s 3-2 decisions were:

1. Shepard, C.J., Dickson, J., Sullivan, J.: *Norris v. State*, 896 N.E.2d 1149 (Ind. 2008) (Dickson, J.).
2. Shepard, C.J., Dickson, J., Boehm, J.: *In re Benkie*, 892 N.E.2d 1237 (Ind. 2008) (per curiam); *Bowles v. State*, 891 N.E.2d 30 (Ind. 2008) (Boehm, J.); *State v. Jackson*, 889 N.E.2d 819 (Ind. 2008) (Dickson, J.); *Belvedere v. State*, 889 N.E.2d 296 (Ind. 2008) (Boehm, J.); *Membres v. State*, 889 N.E.2d 265 (Ind. 2008) (Boehm, J.), *reh’g denied*; *Villas W. II of Willowridge Homeowners Ass’n v. McGlothlin*, 885 N.E.2d 1274 (Ind. 2008) (Shepard, C.J.), *cert. denied*, 129 S. Ct. 1527 (2009).
3. Shepard, C.J., Dickson, J., Rucker, J.: *Queerey & Harrow, Ltd. v. Transcon. Ins. Co.*, 885 N.E.2d 1235 (Dickson, J.).
4. Shepard, C.J., Sullivan, J., Boehm, J.: *Overton v. Grillo*, 896 N.E.2d 499 (Ind. 2008) (Boehm, J.), *reh’g denied*; *Walden v. State*, 895 N.E.2d 1182 (Ind. 2008) (Sullivan, J.); *Smith v. State*, 889 N.E.2d 261 (Ind. 2008) (Sullivan, J.); *Ind. State Univ. v. LaFief*, 888 N.E.2d 184 (Ind. 2008) (Shepard, C.J.); *State Farm Mut. Auto. Ins. Co. v. D.L.B.*, 881 N.E.2d 665 (Ind. 2008) (Sullivan, J.); *Keesling v. Beegle*, 880 N.E.2d 1202 (Ind. 2008) (Sullivan, J.).
5. Shepard, C.J., Sullivan, J., Rucker, J.: *Sweatt v. State*, 887 N.E.2d 81 (Ind. 2008) (Shepard, C.J.); *Auto-Owners Ins. Co. v. Bank One*, 879 N.E.2d 1086 (Ind. 2008) (Sullivan, J.).
6. Shepard, C.J., Boehm, J., Rucker, J.: *In re Fieger*, 887 N.E.2d 87 (Ind. 2008) (per curium).
7. Dickson, J., Sullivan, J., Rucker, J.: *600 Land, Inc. v. Metro. Bd. of Zoning Appeals of Marion County*, 889 N.E.2d 305 (Ind. 2008) (Sullivan, J.); *Watts v. State*, 885 N.E.2d 1228 (Ind. 2008) (Sullivan, J.).
8. Dickson, J., Bohm, J., Rucker, J.: *Newton v. State*, 894 N.E.2d 192 (Ind. 2008) (Dickson, J.).
9. Sullivan, J., Boehm, J., Rucker, J.: *In re Coleman*, 885 N.E.2d 1238 (Ind. 2008) (per curiam); *Cent. Ind. Podiatry, P.C. v. Krueger*, 882 N.E.2d 723 (Ind. 2008) (Boehm, J.).
10. Boehm, J., Sullivan, J.: *Herron v. Anigbo*, 897 N.E.2d 444 (Ind. 2008) (Boehm J.).

TABLE E-1
DISPOSITION OF CASES REVIEWED BY TRANSFER
AND DIRECT APPEALSⁿ

	Reversed or Vacated ^o	Affirmed	Total
Civil Appeals Accepted for Transfer	35 (80.0%)	9 (20.0%)	44
Direct Civil Appeals	1 (100.0%)	0 (0%)	1
Criminal Appeals Accepted for Transfer	31 (81.6%)	7 (18.4%)	38
Direct Criminal Appeals	0 (0%)	5 (100%)	5
Total	67 (76.1%)	21 (23.9%)	88 ^p

ⁿ Direct criminal appeals are cases in which the trial court imposed a death sentence. *See* IND. CONST. art. VII, § 4. Thus, direct criminal appeals are those directly from the trial court. A civil appeal may also be direct from the trial court. *See* IND. APP. R. 56, 63 (pursuant to Rules of Procedure for Original Actions). All other Indiana Supreme Court opinions are accepted for transfer from the Indiana Court of Appeals. *See* IND. APP. R. 57.

^o Generally, the term “vacate” is used by the Indiana Supreme Court when it is reviewing a court of appeals opinion, and the term “reverse” is used when the court overrules a trial court decision. A point to consider in reviewing this Table is that the court technically “vacates” every court of appeals opinion that is accepted for transfer, but may only disagree with a small portion of the reasoning and still agree with the result. *See* IND. APP. R. 58(A). As a practical matter, “reverse” or “vacate” simply represents any action by the court that does not affirm the trial court or court of appeals’s opinion.

^p This does not include one attorney discipline opinion. This opinion did not reverse, vacate, or affirm any other court’s decision.

TABLE E-2
DISPOSITION OF PETITIONS TO TRANSFER
TO SUPREME COURT IN 2008^q

	Denied or Dismissed	Granted	Total
Petitions to Transfer			
Civil ^r	247 (84.0%)	47 (16.0%)	294
Criminal ^s	475 (91.5%)	44 (8.5%)	519
Juvenile	42 (93.3%)	3 (6.7%)	45
Total	764 (89.0%)	94 (11.0%)	858

^q This Table analyzes the disposition of petitions to transfer by the court. *See* IND. APP. R. 58(A).
^r This also includes petitions to transfer in tax cases and workers' compensation cases.
^s This also includes petitions to transfer in post-conviction relief cases.

TABLE F
SUBJECT AREAS OF SELECTED DISPOSITIONS
WITH FULL OPINIONS^t

Original Actions	Number
• Certified Questions	0
• Writs of Mandamus or Prohibition	0
• Attorney Discipline	8 ^u
• Judicial Discipline	0
Criminal	
• Death Penalty	2 ^v
• Fourth Amendment or Search and Seizure	4 ^w
• Writ of Habeas Corpus	0
Emergency Appeals to the Supreme Court	4 ^x
Trusts, Estates, or Probate	2 ^y
Real Estate or Real Property	9 ^z
Personal Property	0
Landlord-Tenant	2 ^{aa}
Divorce or Child Support	5 ^{bb}
Children in Need of Services (CHINS)	0
Paternity	1 ^{cc}
Product Liability or Strict Liability	1 ^{dd}
Negligence or Personal Injury	4 ^{ee}
Invasion of Privacy	0
Medical Malpractice	5 ^{ff}
Indiana Tort Claims Act	0
Statute of Limitations or Statute of Repose	9 ^{gg}
Tax, Department of State Revenue, or State Board of Tax Commissioners	1 ^{hh}
Contracts	5 ⁱⁱ
Corporate Law or the Indiana Business Corporation Law	0
Uniform Commercial Code	1 ^{jj}
Banking Law	1 ^{kk}
Employment Law	3 ^{ll}
Insurance Law	6 ^{mm}
Environmental Law	2 ⁿⁿ
Consumer Law	0
Workers' Compensation	2 ^{oo}
Arbitration	0
Administrative Law	3 ^{pp}
First Amendment, Open Door Law, or Public Records Law	0
Full Faith and Credit	0
Eleventh Amendment	0
Civil Rights	0
Indiana Constitution	17 ^{qq}

^t This Table is designed to provide a general idea of the specific subject areas upon which the court ruled or discussed and how many times it did so in 2008. It is also a quick-reference guide to court rulings for practitioners in specific areas of the law. The numbers corresponding to the areas of law reflect the number of cases in which the court substantively discussed legal issues about these subject areas. Also, any attorney discipline case resolved by order (as opposed to an opinion) was not considered in preparing this Table.

^u *In re Anonymous*, 896 N.E.2d 916 (Ind. 2008); *In re Powell*, 893 N.E.2d 729 (Ind. 2008); *In re Benkie*, 892 N.E.2d 1237 (Ind. 2008); *In re Patterson*, 888 N.E.2d 752 (Ind. 2008); *In re Fieger*, 887 N.E.2d 87 (Ind. 2008); *In re Colman*, 885 N.E.2d 1238 (Ind. 2008); *In re Cueller*, 880 N.E.2d 1209 (Ind. 2008); *In re Bash*, 880 N.E.2d 1182 (Ind. 2008).

^v *Jeter v. State*, 888 N.E.2d 1257 (Ind. 2008); *Sholes v. State*, 878 N.E.2d 1232 (Ind. 2008).

^w *Bowles v. State*, 891 N.E.2d 30 (Ind. 2008); *Belvedere v. State*, 889 N.E.2d 286 (Ind. 2008); *Membres v. State*, 889 N.E.2d 265 (Ind. 2008); *Campos v. State*, 885 N.E.2d 590 (Ind. 2008).

^x *Marion County Election Bd. v. Schoettle*, 899 N.E.2d 642 (Ind. 2008); *Wagler v. W. Boggs Sewer Dist., Inc.*, 898 N.E.2d 815 (Ind. 2008); *State v. Am. Family Voices, Inc.*, 898 N.E.2d 293 (Ind. 2008); *State v. Oddi-Smith*, 878 N.E.2d 1245 (Ind. 2008).

^y *Carlson v. Sweeney, Dabagia, Donoghue, Thorne, Janes & Pagos*, 895 N.E.2d 1191 (Ind. 2008); *McPeek v. McCordle*, 888 N.E.2d 171 (Ind. 2008).

^z *Wagler v. W. Boggs Sewer Dist., Inc.*, 898 N.E.2d 815 (Ind. 2008); *600, Land Inc. v. Metro. Bd. of Zoning Appeals*, 889 N.E.2d 305 (Ind. 2008); *Brenwick Assoc., LLC v. Boone County Redev. Comm'n*, 889 N.E.2d 289 (Ind. 2008); *Pflanz v. Foster*, 888 N.E.2d 756 (Ind. 2008); *McPeek v. McCordle*, 888 N.E.2d 171 (Ind. 2008); *Kopczynski v. Barger*, 887 N.E.2d 928 (Ind. 2008); *Nu-Sash of Indianapolis, Inc. v. Carter*, 887 N.E.2d 92 (Ind. 2008); *Villas W. II of Willowridge Homeowners Ass'n v. McGlothlin*, 885 N.E.2d 1274 (Ind. 2008); *State v. Universal Outdoor, Inc.*, 880 N.E.2d 1188 (Ind. 2008).

^{aa} *Morton v. Ivacic*, 898 N.E.2d 1196 (Ind. 2008); *Pinnacle Props. Dev. Group, Inc. v. City of Jeffersonville*, 893 N.E.2d 726 (Ind. 2008).

^{bb} *Bailey v. Mann*, 895 N.E.2d 1215 (Ind. 2008); *Young v. Young*, 891 N.E.2d 1045 (Ind. 2008); *In re Marriage of Huss*, 888 N.E.2d 1238 (Ind. 2008); *Stewart v. Vulliet*, 888 N.E.2d 761 (Ind. 2008); *Baxendale v. Raich*, 878 N.E.2d 1252 (Ind. 2008).

^{cc} *In re Marriage of Huss*, 888 N.E.2d 1238 (Ind. 2008).

^{dd} *Technisand, Inc. v. Melton*, 898 N.E.2d 303 (Ind. 2008).

^{ee} *Travelers Cas. & Sur. Co. v. U.S. Filter Corp.*, 895 N.E.2d 1172 (Ind. 2008); *Kopczynski v. Barger*, 887 N.E.2d 928 (Ind. 2008); *Nichols v. Minnick*, 885 N.E.2d 1 (Ind. 2008); *Filip v. Block*, 879 N.E.2d 1076 (Ind. 2008).

^{ff} *Newkirk v. Bethlehem Woods Nursing & Rehab. Ctr., LLC*, 898 N.E.2d 299 (Ind. 2008); *Herron v. Anigbo*, 897 N.E.2d 444 (Ind. 2008); *Overton v. Grillo*, 896 N.E.2d 499 (Ind. 2008); *Chi Yun Ho v. Frye*, 880 N.E.2d 1192 (Ind. 2008); *Brinkman v. Bueter*, 879 N.E.2d 549 (Ind. 2008).

^{gg} *Technisand, Inc. v. Melton*, 898 N.E.2d 303 (Ind. 2008); *Newkirk v. Bethlehem Woods Nursing & Rehab. Ctr., LLC*, 898 N.E.2d 299 (Ind. 2008); *Herron v. Anigbo*, 897 N.E.2d 444 (Ind. 2008); *Overton v. Grillo*, 896 N.E.2d 499 (Ind. 2008); *Pflanz v. Foster*, 888 N.E.2d 756 (Ind. 2008); *Jewell v. State*, 887 N.E.2d 939 (Ind. 2008); *Auto-Owners Ins. v. Bank One*, 879 N.E.2d 1086 (Ind. 2008); *Filip v. Block*, 879 N.E.2d 1076 (Ind. 2008); *Brinkman v. Bueter*, 879 N.E.2d 549 (Ind. 2008).

^{hh} *Young v. Young*, 891 N.E.2d 1045 (Ind. 2008).

ⁱⁱ *Ind. Dep't of Env'tl. Mgmt. v. Raybestos Prods. Co.*, 897 N.E.2d 469 (Ind. 2008); *Roberts v. Community Hosps. of Ind., Inc.*, 897 N.E.2d 458 (Ind. 2008); *Reuille v. E.E. Brandenberger Constr., Inc.*, 888 N.E.2d 770 (Ind. 2008); *Nu-Sash of Indianapolis, Inc. v. Carter*, 887 N.E.2d 92 (Ind. 2008); *Cent. Ind. Podiatry P.C. v. Krueger*, 882 N.E.2d 723 (Ind. 2008).

^{jj} *Auto-Owners Ins. Co. v. Bank One*, 879 N.E.2d 1086 (Ind. 2008).

^{kk} *Auto-Owners Ins. Co. v. Bank One*, 879 N.E.2d 1086 (Ind. 2008).

^{ll} *Barnett v. Clark*, 889 N.E.2d 281 (Ind. 2008); *Ind. State Univ. v. LaFief*, 888 N.E.2d 184 (Ind. 2008); *Cent. Ind. Podiatry P.C. v. Krueger*, 882 N.E.2d 723 (Ind. 2008).

^{mm} *Travelers Cas. & Sur. Co. v. U.S. Filter Corp.*, 895 N.E.2d 1172 (Ind. 2008); *Querrey & Harrow, Ltd. v. Transcon. Ins. Co.*, 885 N.E.2d 1235 (Ind. 2008); *Elliot v. Allstate Ins. Co.*, 881 N.E.2d 662 (Ind. 2008); *State Farm Mut. Auto. Ins. Co. v. D.L.B. ex rel. Brake*, 881 N.E.2d 665 (Ind. 2008); *State Farm Mut. Auto. Ins. Co. v. Jakpuko*, 881 N.E.2d 654 (Ind. 2008); *Filip v. Block*, 879 N.E.2d 1076 (Ind. 2008).

ⁿⁿ Ind. Dep't of Envtl. Mgmt. v. Raybestos Prods. Co., 897 N.E.2d 469 (Ind. 2008); Pflanz v. Foster, 888 N.E.2d 756 (Ind. 2008).

^{oo} Christopher R. Brown, D.D.S., Inc. v. Decatur County Mem'l Hosp., 892 N.E.2d 642 (Ind. 2008); Mayes v. Second Injury Fund, 888 N.E.2d 773 (Ind. 2008).

^{pp} Ind. Dep't of Envtl. Mgmt. v. Raybestos Prods. Co., 897 N.E.2d 469 (Ind. 2008); Brenwick Assocs., LLC v. Boone County Redev. Comm'n, 889 N.E.2d 289 (Ind. 2008); Ind. State Univ. v. LaFief, 888 N.E.2d 184 (Ind. 2008).

^{qq} State v. Washington, 898 N.E.2d 1200 (Ind. 2008); Harris v. State, 897 N.E.2d 927 (Ind. 2008); Herron v. Anigbo, 897 N.E.2d 444 (Ind. 2008); Cardwell v. State, 895 N.E.2d 1219 (Ind. 2008); Bassett v. State, 895 N.E.2d 1201 (Ind. 2008); Lee v. State, 892 N.E.2d 1231 (Ind. 2008); Christopher R. Brown, D.D.S., Inc. v. Decatur County Mem'l Hosp., 892 N.E.2d 642 (Ind. 2008); Bowles v. State, 891 N.E.2d 30 (Ind. 2008); Membres v. State, 889 N.E.2d 265 (Ind. 2008); Campos v. State, 885 N.E.2d 590 (Ind. 2008); Higgason v. State Dep't of Corr., 883 N.E.2d 816 (Ind. 2008); Higgason v. Ind. Dep't of Corr., 883 N.E.2d 814 (Ind. 2008); Higgason v. Ind. Dep't of Corr., 883 N.E.2d 812 (Ind. 2008); Smith v. Ind. Dep't of Corr., 883 N.E.2d 802 (Ind. 2008); City of Carmel v. Martin Marietta Materials, Inc., 883 N.E.2d 781 (Ind. 2008); Gauvin v. State, 883 N.E.2d 99 (Ind. 2008); Brinkman v. Bueter, 879 N.E.2d 549 (Ind. 2008).

SURVEY OF INDIANA ADMINISTRATIVE LAW

JENNIFER WHEELER TERRY*

Administrative law is the body of law concerning the operation of administrative agencies. This Article reviews the application of administrative law to agencies operating at the Indiana state and local level. For the most part, the principles of administrative law are well settled in Indiana, and this article summarizes Indiana Administrative Law, and particularly case law, as courts apply those well settled principles to the particular disputes arising during the survey period from October 1, 2007 through September 30, 2008.

I. JUDICIAL REVIEW

Indiana's Administrative Orders and Procedures Act (AOPA) provides that a court may provide relief only if the agency action is:

(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; or (5) unsupported by substantial evidence.¹

Judicial review from agencies not explicitly governed by AOPA frequently applies the same or similar standard of review to decisions of those agencies.

A. *Standard of Review—in General*

Although the standard of review is deferential in most respects, particularly on issues of fact and statutory interpretation, it is not surprising that the standard of review itself sometimes becomes an issue on appeal as parties try to convince the court to apply a standard which best serves their purposes. This occurred in *Town of Chandler v. Indiana-American Water Co.*² when Chandler argued that the standard of review was de novo because the issue was one of statutory interpretation.³ Indiana-American countered this position and claimed that the reviewing court should defer to the construction of a statute by the administrative agency charged with enforcing it.⁴

Not only did the parties disagree over the appropriate standard of review, but the appellee, Indiana-American, moved to strike portions of Chandler's reply brief because Chandler raised the appropriate standard of review for the first time at the reply stage.⁵ On this aspect of the debate, the court of appeals held that the

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1. IND. CODE § 4-21.5-5-14(d) (2005).

2. 892 N.E.2d 1264 (Ind. Ct. App. 2008).

3. *Id.* at 1267.

4. *Id.*

5. *Id.*

issue of which standard of review to apply is always before the reviewing court, and that parties need not present the standard of review as an issue before the court can address it.⁶

After resolving this preliminary issue, the court applied a *de novo* standard of review because the statute in question was not one that the Indiana Utility Regulatory Commission was charged with enforcing, but rather one which set forth the jurisdiction of the Commission to hear certain disputes.⁷

B. Scope of Review

The Indiana Supreme Court addressed whether it was proper for the reviewing court to reach the merits of a case arising out of an administrative decision in *600 Land, Inc. v. Metropolitan Board of Zoning Appeals of Marion County*.⁸ In a 3-2 decision, the court chose to address a critical issue on the merits, despite certain parties' failure to present the question to the Board of Zoning Appeal (BZA).⁹

As the court explained, the landowner sought a special exception from the BZA for land that the landowner intended to develop as a solid waste transfer station and recycling facility.¹⁰ The BZA denied the petition.¹¹ The landowner sought judicial review and amended its appeal to argue that it was not required to obtain a special exception at all because its use fell within the approved use for the zoning district.¹²

The trial court held that the landowner was required to obtain a special use exception and affirmed the denial of the special exception.¹³ The court of appeals agreed that a special use exception was required, but reversed the BZA's denial on grounds that its findings were unsupported by the evidence.¹⁴ The BZA and an adjoining landowner sought transfer.¹⁵

Although the landowner had not challenged whether it needed a special exception to the BZA, the supreme court indicated it was appropriate to review the case on the merits for three reasons.¹⁶ First, the landowner had been advised to seek the special exception and doing so was the most practical approach that placed the least burden on the legal system.¹⁷ Second, the court found that the BZA or other intervenors were not prejudiced by the way the case evolved—the

6. *Id.* at 1268.

7. *Id.*

8. 889 N.E.2d 305 (Ind. 2008).

9. *Id.* at 307-08.

10. *Id.* at 306-07.

11. *Id.* at 307.

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.* at 307-08.

17. *Id.* at 308.

BZA's decision would have been reviewed de novo as an issue of law.¹⁸ Finally, neither the BZA nor intervenors objected to the issue being raised at the trial court.¹⁹

After resolving this issue, the majority reversed the trial court and found that the proposed waste transfer station was a permitted use under the zoning ordinance without a special exception.²⁰ Justice Boehm, writing for the dissent, questioned the majority's reasoning, suggesting that the majority had failed to give appropriate deference to the interpretation advanced by the agency charged with the ordinance's enforcement.²¹

C. Application of Standard of Review

1. *Arbitrary and Capricious or an Abuse of Discretion.*—Two cases during the survey period contained substantial discussions of the arbitrary and capricious standard. In *Board of Commissioners of LaPorte County v. Great Lakes Transfer, LLC*,²² the court of appeals upheld a decision by the Office of Environmental Adjudication (OEA) regarding the issuance of a solid waste transfer facility permit.²³ County boards and towns challenged several portions of the OEA's decision as arbitrary or capricious.²⁴ However, all of their arguments were rejected.

After setting forth the AOPA standard of review, the court of appeals noted that a reviewing court may not “substitute its judgment for that of the agency.”²⁵ The court further stated that “an action is arbitrary and capricious where there is no reasonable basis for the action.”²⁶

One issue was whether OEA should have granted a permit even though the applicant, Great Lakes Transfer, did not have a permit for road access.²⁷ The regulation required the applicant to provide a plot plan showing how the facility would have road access.²⁸ The court found that OEA's decision was not arbitrary or capricious.²⁹ In addition, the court held that OEA's decision was not arbitrary or capricious even though Great Lakes Transfer's building permit was later rescinded because when the permit was issued, Great Lakes Transfer had a valid

18. *Id.*

19. *Id.*

20. *Id.* at 312.

21. *Id.* (Boehm, J., dissenting).

22. 888 N.E.2d 784, 787 (Ind. Ct. App. 2008).

23. *Id.*

24. *Id.*

25. *Id.* at 788 (quoting *Ind. Dep't of Env'tl. Mgmt. v. Boone County Res. Recovery Sys., Inc.*, 803 N.E.2d 267, 271 (Ind. Ct. App. 2004)).

26. *Id.* at 789 (citing *Boone County*, 803 N.E.2d at 272.).

27. *Id.* at 791.

28. *Id.* at 794.

29. *Id.* at 795.

building permit.³⁰ The court of appeals also emphasized that the applicant would not be exempt from complying with other state and local requirements, such as having a driveway permit³¹ or building permit,³² just because it had the IDEM permit.

Appellants also argued that IDEM failed to consider concerns regarding wetlands surrounding the site, however, both the trial court and court of appeals found that there was no requirement for IDEM to consider generalized possibilities of harm.³³

With regard to the appellants' final argument that IDEM ignored certain other environmental concerns expressed by the public, the court found that those arguments were based on a separate statute discussing IDEM's duty to investigate concerns.³⁴ IDEM properly conducted public hearings and received public comments, and there was no evidence of negative environmental impact; so, the decision was not arbitrary or capricious.³⁵

In *Madison State Hospital v. Ferguson*³⁶ a nurse supervisor at a state hospital challenged the State's pay plan for nurses which resulted in night nurses receiving higher pay than nurse supervisors.³⁷ The court of appeals determined that the State Employees' Appeals Commission (SEAC) did not act arbitrarily or capriciously.³⁸ The SEAC had analyzed national and local market surveys, which showed a high turnover rate of night nurses and the difficulties experienced in recruiting people to fill that position.³⁹ This data analysis showed that the agency action was not arbitrary and capricious.⁴⁰

2. *Contrary to Law*.—The Indiana Natural Resources Commission's (NRC) determination regarding parties riparian rights—specifically the manner of determining boundaries that extend from shore—was challenged as being contrary to law in *Lukis v. Ray*.⁴¹ The trial court found that the NRC's determination was contrary to law, but the court of appeals reversed.⁴² Case law indicated several different methods of establishing the extension of boundaries into a lake.⁴³ The NRC used one method, but the trial court adopted a different

30. *Id.* at 798-801.

31. *Id.* at 795.

32. *Id.* at 801.

33. *Id.* at 801-02.

34. *Id.* at 803-04.

35. *Id.* at 804.

36. 874 N.E.2d 615 (Ind. Ct. App. 2007), *trans. denied*, 891 N.E.2d 39 (Ind. 2008).

37. *Id.* at 617-18.

38. *Id.* at 620. *Madison State* also presented a challenge alleging the SEAC's decision was contrary to law. *Id.* at 621. This too was rejected. *Id.*

39. *Id.*

40. *Id.*

41. 888 N.E.2d 325, 326 (Ind. Ct. App.), *trans. denied*, 898 N.E.2d 1225 (Ind. 2008).

42. *Id.* at 333.

43. *Id.* at 331-32.

analysis.⁴⁴ The court of appeals found that the trial court had impermissibly second guessed the agency.⁴⁵

The court of appeals held that an agency had erred as a matter of law in *In re South Haven Sewer Works, Inc.*⁴⁶ A consent decree between the federal Environmental Protection Agency (EPA) and South Haven required South Haven to obtain the EPA's prior approval before filing a petition with the Indiana Utility Regulatory Commission (IURC) to expand its service territory.⁴⁷ The IURC issued a certificate of territorial authority (CTA) despite the fact that South Haven had not complied with the decree.⁴⁸ In issuing the CTA, the IURC relied upon extrinsic evidence including testimony and other documents to determine the intent of the parties.⁴⁹ The court of appeals determined that the IURC had erred because the language of the consent decree was unambiguous and its terms were conclusive.⁵⁰

Conflicts between two agencies arose in *Pierce v. State Department of Correction*,⁵¹ which concerned the Department of Correction's (DOC) interpretation of its authority to order teachers within correctional facilities to have special education licenses.⁵² Under an agreement between the State of Indiana and the U.S. Department of Justice, the State agreed that all teachers in specific correctional facilities would obtain special education certificates.⁵³ The DOC then sought to apply the same rule to all facilities in the state.⁵⁴ A group of teachers filed complaints which reached the SEAC. The SEAC agreed that the DOC could require the teachers to obtain a special education license, but it also recommended that the DOC assist the teachers in paying for obtaining the new licenses and to establish a waiver system.⁵⁵

The underlying issue required the court to decide how to reconcile title 11 of the Indiana Code, which concerns corrections, and title 20 of the code, which governs education.⁵⁶ After undertaking its own review of the statutes in question, the court found that the DOC's interpretation of the statutes was not unreasonable and therefore not arbitrary, capricious, or in violation of constitutional, statutory, or legal principles.⁵⁷

With regard to whether the trial court improperly ordered the DOC to comply

44. *Id.* at 332.

45. *Id.*

46. 880 N.E.2d 706 (Ind. Ct. App. 2008).

47. *Id.* at 709-10.

48. *Id.*

49. *Id.* at 712.

50. *Id.*

51. 885 N.E.2d 77 (Ind. Ct. App. 2008).

52. *Id.* at 78.

53. *Id.* at 79.

54. *Id.* at 80.

55. *Id.* at 82-87.

56. *Id.* at 88.

57. *Id.* at 91.

with SEAC's recommendations, the court of appeals held that the SEAC's recommendations were not mandatory.⁵⁸ The recommendations were made under the part of the statute that speaks broadly to SEAC's authority to recommend policy and the trial court had improperly ordered the DOC to comply.⁵⁹

3. *Substantial Evidence*.—Challenges based on substantial evidence are not frequently successful, as the cases arising during the survey period show. A decision by the BZA not to grant a special exception was reviewed for substantial evidence in *Midwest Minerals, Inc. v. Board of Zoning Appeals*.⁶⁰ The court of appeals stated that "evidence will be considered substantial if it is more than a scintilla and less than preponderance. In other words, substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."⁶¹ The Zoning Ordinance at issue indicated that an applicant may be awarded a special exception if it met three requirements.⁶² The BZA found that the landowner failed to meet one of the requirements, specifically the applicant had failed to prove that its proposed use of the property would not be injurious to the public health, safety, comfort, morals, convenience, or general welfare of the community.⁶³

The court of appeals found that the BZA's decision was supported by substantial evidence.⁶⁴ The crux of the applicant's appeal was that once it complied with the relevant statutory criteria, granting a special exception was mandatory.⁶⁵ The court disagreed, finding that the BZA had discretion to deny the permit if it found the application would not serve the public welfare, even if the applicant met the other criteria.⁶⁶

An issue of substantial evidence was also presented in *Dietrich Industries, Inc. v. Teamsters Local Unit 142*.⁶⁷ In *Dietrich* a company appealed the Unemployment Insurance Review Board's determination that its employees were eligible for benefits during a lockout and subsequent "start-up."⁶⁸ A key issue relative to the entitlement of benefits was whether the parties had reached an impasse in negotiations. The Administrative Law Judge (ALJ) found that an impasse existed from May to September, but not at the time of the lockout.⁶⁹ The court stated that the existence of an impasse is a factual determination, which the

58. *Id.* at 93.

59. *Id.*

60. 880 N.E.2d 1264 (Ind. Ct. App.), *trans. denied*, 898 N.E.2d 1223 (Ind. 2008).

61. *Id.* at 1269 (citing *Crooked Creek Conservation & Gun Club v. Hamilton County N. Bd. of Zoning Appeals*, 677 N.E.2d 544, 547-48 (Ind. Ct. App. 1997)).

62. *Id.*

63. *Id.* at 1270 (citing *Crooked Creek*, 677 N.E.2d at 547).

64. *Id.* at 1269-70.

65. *Id.* at 1270.

66. *Id.*

67. 880 N.E.2d 700 (Ind. Ct. App. 2008).

68. *Id.* at 702.

69. *Id.* at 703-04.

court was bound to uphold as long as it was supported by substantial evidence.⁷⁰ The court defined an impasse as the “absence of an atmosphere in which a reasonably foreseeable settlement of the disputed issues might be resolved,”⁷¹ and the court could not say that the ALJ had erred by finding the offer to return to work created such an atmosphere.⁷²

In *Employee Benefit Managers, Inc. of America v. Indiana Department of Insurance*,⁷³ the court stated that the substantial evidence standard is met “[i]f a reasonable person would conclude that the evidence and the logical and reasonable inferences therefrom are of such a substantial character and probative value so as to support the administrative determination.”⁷⁴ The company challenging the agency’s decision did not meet its burden of showing a lack of substantial evidence because the company’s president had conceded certain deficiencies.⁷⁵ The company argued that the findings emphasized minor portions of testimony and that it had substantially complied with requirements.⁷⁶ The court of appeals rejected these arguments.⁷⁷

The court of appeals also discussed the proper application of the *McDonnell Douglas* burden-shifting analysis applicable to employment discrimination cases in *Whirlpool Corp. v. Vanderburgh County-City of Evansville Human Relations Commission*.⁷⁸ Reviewing courts can (1) only point out legal errors in the application of the *McDonnell Douglas* burden-shifting method, and (2) examine the record for substantial evidence of each prong of the analysis.⁷⁹

D. Statutory Interpretation

Two cases during the survey period reached different results on issues of statutory interpretation. *Indiana Department of Environmental Management v. Construction Management Associates, L.L.C.*,⁸⁰ contains a very good summary of how courts approach issues of statutory interpretation.⁸¹ IDEM is charged with enforcing the Federal Safe Drinking Water Act (SDWA) within Indiana.⁸² As part of enforcing that regulation, the Indiana Water Pollution Control Board

70. *Id.* at 704.

71. *Id.* at 703 (quoting *Auburn v. Review Bd. of Ind. Employment Sec. Div.*, 437 N.E.2d 1011, 1014 (Ind. Ct. App. 1982)).

72. *Id.* at 703-04.

73. 882 N.E.2d 230 (Ind. Ct. App.), *trans. denied*, 898 N.E.2d 1217 (Ind. 2008).

74. *Id.* at 237.

75. *Id.*

76. *Id.*

77. *Id.*

78. 875 N.E.2d 751, 758 (Ind. Ct. App. 2007).

79. *Id.* at 759-60.

80. 890 N.E.2d 107 (Ind. Ct. App. 2008).

81. *Id.* at 112-14.

82. *Id.* at 109.

promulgated regulations defining a “public water system.”⁸³ IDEM claimed that a construction company was operating a “public water system” for an apartment complex that had been constructed in two phases.⁸⁴ On appeal, IDEM claimed the trial court failed to defer to IDEM’s reasonable interpretation of a rule it is charged with enforcing.⁸⁵

The court of appeals set forth the framework courts should use when reviewing an issue of statutory interpretation by first noting that issues of statutory interpretation are questions of law reviewed *de novo*.⁸⁶ “When a statute has not previously been construed, [a court’s] interpretation is controlled by the express language of the statute and the rules of statutory construction.”⁸⁷ If a term in the statute is undefined, the reviewing court must “‘examine the statute as a whole and attribute the common and ordinary meaning to the undefined word, unless doing so would deprive the statute of its purpose or effect.’”⁸⁸

Nevertheless, the court of appeals suggested that even under a *de novo* standard, the agency’s interpretation of a statute it is charged with enforcing is entitled to deference. The agency’s interpretation “is entitled to great weight, unless that interpretation is inconsistent with the statute itself.”⁸⁹ As the court further explained, “[o]nce a court determines that an administrative agency’s interpretation is reasonable, it should ‘terminate [] its analysis’ and not address the reasonableness of the other party’s interpretation.”⁹⁰ This rule acknowledges the expertise of agencies, empowers such agencies to interpret and enforce statutes, and increases public reliance on agency interpretations.⁹¹

The court of appeals found that IDEM’s interpretation was reasonable even though it hinged on a meaning of a term which was undefined in the statute.⁹² The court found that IDEM’s definition was supported by Black’s Law Dictionary and Webster’s Third New International Dictionary as well as Congress’s intent in passing the SDWA.⁹³

A similar question arose in *South Bend Community School Corp. v. Lucas*,⁹⁴ where a teacher with the federally funded Head Start program applied for employment compensation during the program’s summer break.⁹⁵ Indiana has

83. *Id.* at 110.

84. *Id.*

85. *Id.* at 111.

86. *Id.* at 112.

87. *Id.* (citing *Ross v. Ind. State Bd. of Nursing*, 790 N.E.2d 110, 119 (Ind. Ct. App. 2003)).

88. *Id.* (quoting *Consolidation Coal Co. v. Ind. Dep’t of State Revenue*, 583 N.E.2d 1199, 1201 (Ind. 1991)).

89. *Id.* at 113 (citing *LTV Steel Co. v. Griffin*, 730 N.E.2d 1251, 1257 (Ind. 2000)).

90. *Id.* (quoting *Ind. Wholesale Wine & Liquor Co. v. State ex rel. Ind. Alcoholic Beverage Comm’n*, 695 N.E.2d 99, 105 (Ind. 1998)).

91. *Id.* (citing *Ind. Wholesale Wine*, 695 N.E.2d at 105).

92. *Id.*

93. *Id.* at 113-14.

94. 881 N.E.2d 30 (Ind. Ct. App.), *trans. denied*, 891 N.E.2d 52 (Ind. 2008).

95. *Id.* at 31.

“statutorily excluded employees of educational institutions from receiving unemployment benefits for periods of unemployment between academic terms,”⁹⁶ however, the statute does not define “educational institution.”⁹⁷ The Unemployment Insurance Review Board found that the Head Start program was not an educational institution within the meaning of the relevant statute and therefore that the teacher was eligible for unemployment insurance during the summer breaks.⁹⁸

The court of appeals set forth the statutory framework⁹⁹ and found that the Board’s decision was incorrect.¹⁰⁰ In doing so, the court relied heavily on legislative intent that the Head Start program be treated as an educational institution for the purpose of unemployment compensation.¹⁰¹

Judge Riley’s dissenting opinion stated that the majority failed to follow its quoted standard of review that the reviewing court should defer to the agency charged with enforcing a statute when the court is faced with two reasonable interpretations.¹⁰² Judge Riley listed several reasons why she believed that the educational aspect of the Head Start program was incidental to its primary purpose of bringing the children to a level of social development where they would be better equipped to deal with the environment of the traditional school.¹⁰³ Therefore, Judge Riley concluded that the Board’s interpretation was reasonable and she would have affirmed that decision.¹⁰⁴

In another case during the survey period, the court of appeals found that the Worker’s Compensation Board’s interpretation of a statute providing death benefits was reasonable.¹⁰⁵ There was no modern case law on point as to whether a separated spouse was entitled to death benefits and the Board determined that the living arrangement did not satisfy the statutory requirements for compensation as a presumptive dependent.¹⁰⁶

E. Summary Judgment

When a reviewing court is faced with a motion for summary judgment, the court of appeals noted that in addition to the summary judgment standard set forth under Trial Rule 56, when the “procedural requirements are satisfied, a judgment of an administrative board is deemed *prima facie* correct.”¹⁰⁷

96. *Id.* at 32.

97. *Id.* at 32-33 (referencing IND. CODE § 22-4-14-7(a)(1) (2007)).

98. *Id.* at 30-31.

99. *Id.* at 32.

100. *Id.* at 34-35.

101. *Id.*

102. *Id.* at 36 (Riley, J., dissenting).

103. *Id.*

104. *Id.*

105. *Gonzalez v. Wal-Mart Assocs.*, 881 N.E.2d 19, 24-25 (Ind. Ct. App. 2008).

106. *Id.*

107. *Thornberry v. City of Hobart*, 887 N.E.2d 110, 118 (Ind. Ct. App.) (citing *Wiebke v. City*

F. Subject Matter Jurisdiction

With limited exceptions, the subject matter jurisdiction of courts to review agency decisions requires the party seeking review to exhaust its administrative remedies. Whether a party has done so is an issue that frequently arises in administrative law cases. The court of appeals discussed the genesis of the exhaustion of administrative remedies doctrine in *LHT Capital, LLC v. Indiana Horse Racing Commission*.¹⁰⁸ The court reviewed the AOPA exhaustion of remedies requirements codified at Indiana Code section 4-21.5-5-4(a) and the Indiana Supreme Court's cases discussing the policy reasons for the doctrine and considerations of judicial economy.¹⁰⁹

In *LHT*, a minority interest holder in a race track sought review of the horse racing commission's order imposing a transfer fee on divestment of the minority interest holder's interest.¹¹⁰ The court of appeals found that the minority interest holder had not exhausted its administrative remedies. The minority interest holder conceded that it did not raise challenges to the transfer fee at the formal hearing, but relied upon other evidence and communications in which it had raised the issue with the Board.¹¹¹

The minority interest holder argued in the alternative that exhausting its administrative remedies would have been futile, and futility is an exception to the exhaustion of remedies requirement.¹¹² In order to meet the requirements of the futility exception "one must show that the administrative agency was powerless to effect a remedy or that it would have been impossible or fruitless and of no value under the circumstances."¹¹³

The minority interest holder argued that the commission "informed [the minority interest holder] that the Commission had 'declined to hear any challenge to the validity and constitutionality of its transfer tax issue.'"¹¹⁴ However, those communications had allegedly taken place outside of the hearing and there was no evidence in the record of the communications.¹¹⁵ The court of appeals therefore found that *LHT* had failed to demonstrate that presentation to the commission would have been futile.¹¹⁶

LHT also argued that it was not required to exhaust its administrative

of Fort Wayne, 263 N.E.2d 379, 383 (Ind. Ct. App. 1970)), *trans. denied*, 898 N.E.2d 1226 (Ind. 2008).

108. 891 N.E.2d 646, 652 (Ind. Ct. App.), *reh'g denied*, 895 N.E.2d 124 (Ind. Ct. App. 2008).

109. *Id.*

110. *Id.* at 650-51.

111. *Id.* at 653.

112. *Id.* at 654.

113. *Id.* (quoting *Johnson v. Celebration Fireworks*, 829 N.E.2d 979, 984 (Ind. 2005)).

114. *Id.*

115. *Id.*

116. *Id.*

remedies because the rule was facially invalid or unconstitutional.¹¹⁷ The court of appeals acknowledged the Indiana Supreme Court precedent that, under some circumstances, litigants may bypass the exhaustion requirement where “‘a statute is void on its face’ and ‘if an agency’s action is challenged to be ultra vires and void.’”¹¹⁸ The court of appeals distinguished LHT’s actions from those in other Indiana cases because LHT did not file a declaratory judgment action challenging the regulation.¹¹⁹ The court of appeals also noted that LHT filed a petition with the commission and negotiated an agreement that allowed for “a quick resolution.”¹²⁰ The court concluded that

this is a case where “[e]ven if the ground of the complaint is the unconstitutionality of the statute, which may be beyond the agency’s power to resolve, the exhaustion of administrative remedies may still be required because the administrative action may resolve the case on other grounds without confronting broader legal issues.”¹²¹

Having accepted the benefits of the agreement with the commission, LHT could not subsequently litigate that the terms were unconstitutional.¹²²

A similar result was reached in *Goldstein v. Indiana Department of Local Government Finance*.¹²³ In *Goldstein*, homeowners filed a petition for judicial review in the Indiana Tax Court challenging the legality of a vote increasing the county’s income tax and asserting other constitutional claims related to property tax and assessment.¹²⁴ The Indiana Tax Court found that it did not have subject matter jurisdiction to hear the dispute because the petitioners had failed to exhaust their administrative remedies.¹²⁵

The court noted that “[s]ubject matter jurisdiction is the power of a court to hear and determine a particular class of cases.”¹²⁶ The tax court further stated that “[s]ubject matter jurisdiction is not conferred upon a court by consent or agreement of the parties to litigation; rather, it can only be conferred upon a court by the Indiana Constitution or by statute.”¹²⁷ Under Indiana Code section 33-26-3-1 the “tax court has exclusive jurisdiction over any case that arises under the tax laws of Indiana and that is an initial appeal of a final determination made by: (1) the department of state revenue . . . ; or (2) the Indiana board of tax

117. *Id.*

118. *Id.* (quoting *Ind. Dep’t of Evtl. Mgmt. v. Twin Eagle L.L.C.*, 798 N.E.2d 839, 844 (Ind. 2003)).

119. *Id.* at 655-56.

120. *Id.* at 656.

121. *Id.* (quoting *Twin Eagle*, 798 N.E.2d at 844).

122. *Id.*

123. 876 N.E.2d 391 (Ind. Tax Ct. 2007).

124. *Id.* at 392.

125. *Id.* at 396.

126. *Id.* at 393 (citing *K.S. v. State*, 849 N.E.2d 538, 540 (Ind. 2006)).

127. *Id.* (citing *State v. Sproles*, 672 N.E.2d 1353, 1356 (Ind. 1996)).

review.”¹²⁸

The homeowners argued that they should be exempt from the final determination requirement for three reasons.¹²⁹ The homeowners claimed that exhausting their administrative remedies would be either inadequate or futile because neither the Department of State Revenue nor the Indiana State Board of Tax Review were “empowered to rule on the ‘global’ constitutional challenges that they . . . raised.”¹³⁰ The tax court admitted that the Indiana Supreme Court “has acknowledged that construing Indiana’s constitution ‘is not the job, nor an area of expertise’ of Indiana’s administrative tax agencies.”¹³¹ However, the tax court cited additional authority from the Indiana Supreme Court that “taxpayers, including those raising pure constitutional claims, must first pursue the administrative procedures as established by the Legislature.”¹³²

The constitutional issue exception was successfully applied in *Miller*.¹³³ In that case, however, the court was trying to prevent an application of waiver to a litigant who had not received the due process to which he was entitled.¹³⁴

The homeowners in *Goldstein* also claimed that they should be excused from exhaustion of administrative remedies because the issues they raised were of such “unparalleled public interest” that they warranted an immediate ruling on the merits by the tax court.¹³⁵ The court of appeals acknowledged the Indiana Supreme Court’s action in ruling on claims of taxpayers resulting from assessment issues,¹³⁶ but the court found that it simply did not have subject matter jurisdiction in this case.¹³⁷

Finally, the court of appeals rejected the homeowners’ claims that the court might have jurisdiction under Indiana Code section 36-4-4-5.¹³⁸ The tax court found that Indiana Code section 36-4-4-5 relates “to a court of general jurisdiction’s authority to assign responsibility for an act to the appropriate executive or legislative body.”¹³⁹

G. Filing the Record and Other Procedural Issues

*MicroVote General Corp. v. Office of the Secretary of State*¹⁴⁰ affirms that

128. IND. CODE § 33-26-3-1 (2008).

129. *Goldstein*, 876 N.E.2d at 394-96.

130. *Id.* at 394.

131. *Id.* (citing *Sproles*, 672 N.E.2d at 1356).

132. *Id.* (emphasis omitted).

133. See discussion *infra* Part II.B.5.

134. *Miller v. Ind. Dep’t of Workforce Dev.*, 878 N.E.2d 346, 353 (Ind. Ct. App. 2007).

135. *Goldstein*, 876 N.E.2d at 394-95.

136. *Id.* at 395 (discussing *State ex rel. Atty. Gen. v. Lake Superior Court*, 820 N.E.2d 1240 (Ind. 2005)).

137. *Id.*

138. *Id.*

139. *Id.* at 396 (citing IND. CODE § 36-4-4-5 (2007)).

140. 890 N.E.2d 21 (Ind. Ct. App.), *trans. denied*, 898 N.E.2d 1227 (Ind. 2008).

the failure of a party seeking judicial review to file the agency record, or request an extension, within the thirty days allowed by AOPA subjects the case to dismissal.¹⁴¹ In *MicroVote*, a voting machine corporation sought to challenge a determination by the Secretary of State, but did not attach the evidentiary record relied upon by the ALJ and the Secretary of State.¹⁴²

The voting machine corporation argued that it had substantially complied with the requirement to file the record.¹⁴³ Under the precedent from *Izaak Walton League* “less-than-full compliance” with AOPA’s requirements may be acceptable if the materials which are submitted provide the reviewing court with all that is necessary in order to accurately assess the challenged agency action.¹⁴⁴ In *MicroVote*, however, the court of appeals determined that the submitted materials did not meet this standard.¹⁴⁵

The voting machine corporation also alleged that the doctrine of equitable estoppel excused its late filing.¹⁴⁶ The claim was rejected by the court of appeals.¹⁴⁷

The court found that alleged mistakes made by the trial court personnel could not form the basis of a claim of equitable estoppel because neither the trial court nor its personnel were parties to the litigation.¹⁴⁸ The court also rejected an estoppel claim with regard to the Secretary of State.¹⁴⁹ The court stated that the voting machine corporation was responsible for managing its case and should have requested an extension when it became clear that the Secretary of State’s office would not be able to prepare the agency record within the thirty day time frame.¹⁵⁰

The petitioner in *Wrogeman v. Roob*¹⁵¹ also advanced a substantial compliance argument.¹⁵² As in *MicroVote*, the court of appeals held that the petitioner had not sufficiently complied with requirements to file the agency record because it only submitted one document from the agency record.¹⁵³

H. Standing

An issue of standing arose in *Burcham v. Metropolitan Board of Zoning*

141. *Id.* at 25.

142. *Id.* at 27.

143. *Id.* at 26 (citing *Izaak Walton League of Am., Inc. v. DeKalb County Surveyor’s Office*, 850 N.E.2d 957, 965 (Ind. Ct. App. 2006)).

144. *Id.* (citing *Izaak Walton League*, 850 N.E.2d at 965).

145. *Id.* at 27.

146. *Id.* For a discussion of the doctrine of estoppel, see *infra* Part II.F.

147. *MicroVote*, 890 N.E.2d at 28.

148. *Id.*

149. *Id.*

150. *Id.*

151. 877 N.E.2d 219 (Ind. Ct. App. 2007), *trans. denied*, 891 N.E.2d 41 (Ind. 2008).

152. *Id.* at 220-21.

153. *Id.* at 222.

Appeals Division of Marion County.¹⁵⁴ Two property owners and a community association appealed an order granting a zoning variance to a fireworks retailer.¹⁵⁵ The court of appeals reversed the BZA's initial decision because the BZA's findings were not supported by the evidence.¹⁵⁶ The fireworks retailer then filed a declaratory judgment action to determine whether the BZA had jurisdiction to amend its prior findings, and the trial court found that it did.¹⁵⁷

The BZA subsequently modified its previous findings of fact, and the community association sought judicial review.¹⁵⁸ After the trial court affirmed the BZA's modification, the community association appealed.¹⁵⁹ Because the two individual property owners were voluntarily dismissed from the appeal, the BZA and the fireworks retailer asserted that the community association no longer had standing to pursue the appeal.¹⁶⁰

The court of appeals in *Burcham* clarified a line of cases which have incorrectly held that standing "may be raised at any point during the litigation and if not raised by the parties it is the duty of the reviewing court to determine the issue *sua sponte*."'¹⁶¹ The court stated that standing can be "waived by the failure to make a timely objection."'¹⁶² However, in this case, the community association was not given the opportunity to litigate the standing issue in the trial court, and therefore the issue of standing was waived.¹⁶³

A different standing issue was presented in *Sexton v. Jackson County Board of Zoning Appeals*.¹⁶⁴ In *Sexton* the issue was whether the neighbors were "aggrieved" by the BZA's decision granting a special exception to build and operate a concentrated animal feeding operation.¹⁶⁵ Surrounding homeowners had presented evidence that they would suffer a pecuniary loss if the permit was granted, which was sufficient to establish standing to petition for writ of certiorari.¹⁶⁶

I. Supplementation of Record

In general, parties may not supplement the agency record during the judicial

154. 883 N.E.2d 204, 207 (Ind. Ct. App. 2008).

155. *Id.* at 207-08.

156. *Id.* at 208.

157. *Id.* at 208-09.

158. *Id.*

159. *Id.* at 209-10.

160. *Id.* at 210.

161. *Id.* at 211 (quoting *In re City of Fort Wayne*, 381 N.E.2d 1093, 1095 (Ind. Ct. App. 1978)).

162. *Id.* (quoting *Wildwood Park Cmty. Ass'n v. Fort Wayne City Plan Comm'n*, 396 N.E.2d 678, 681 (Ind. Ct. App. 1979)).

163. *Id.* at 212.

164. 884 N.E.2d 889 (Ind. Ct. App. 2008).

165. *Id.* at 893.

166. *Id.* at 894.

review stage of a proceeding; however, two cases addressed supplementation of the record during the survey period. In *Sexton*, homeowners who alleged a violation of Indiana's Open Door law should have been allowed to supplement the record on judicial review to include a videotape of the hearing where the alleged violation occurred.¹⁶⁷ In *Burcham*, the reviewing court did not abuse its discretion by refusing to admit supplemental evidence because the proponent of the evidence did not show that it was prejudiced by exclusion of the information.¹⁶⁸

J. Remand and Reversals

In *Burcham*, the court of appeals reversed, but did not remand, an appeal of a BZA decision. The effect was to vacate and nullify the trial court's decision. "The parties [were] then restored to the position they held before the judgment was pronounced and [ordered to] take their places in the trial court at the point where the error occurred, and proceed to a decision."¹⁶⁹

In *Jackson v. Indiana Family & Social Services Administration*,¹⁷⁰ the court of appeals stated that the trial court should remand to agency for further fact finding under Indiana Code section 4-21.5-5-12(b) when a relevant law or policy changes in a way that could alter the outcome of a case.¹⁷¹

II. AGENCY ACTION

The next group of cases this Survey discusses address issues other than those falling under judicial review such as scope of agency action and adjudications.

A. Scope of Agency Action

As purely statutory creations, the power of administrative agencies is generally considered to be limited to those powers explicitly granted by statute. There are some exceptions to this general rule, however. For example, in *Jet Credit Union v. Loudermilk*,¹⁷² the court of appeals held that an administrative agency could issue an opinion letter even without explicit statutory authority to do so.¹⁷³ Jet Credit Union sought advice from the Indiana Department of Financial Institutions (DFI) on whether to permit a withdrawal of funds by a director and officer who was liable to the credit union.¹⁷⁴ The member,

167. *Id.* at 894-95.

168. *Burcham*, 883 N.E.2d at 213.

169. *Id.* at 215 n.3 (quoting *Grand Trunk W. R.R. Co. v. Kapitan*, 698 N.E.2d 363, 366 (Ind. Ct. App. 1998)).

170. 884 N.E.2d 284 (Ind. Ct. App. 2008).

171. *Id.* at 292. The court of appeals also found that the trial court abused its discretion by dissolving a stay it had entered under Indiana Code section 4-21.5-5-9. *Id.* at 293.

172. 879 N.E.2d 594 (Ind. Ct. App.), *trans. denied*, 891 N.E.2d 49 (Ind. 2008).

173. *Id.* at 598.

174. *Id.* at 596.

Loudermilk, charged Jet with conversion and Jet sought to rely upon the opinion letter from DFI.¹⁷⁵

The court of appeals held that administrative agencies have “broad authority to interpret and enforce pertinent statutes.”¹⁷⁶ Even though there was nothing explicitly authorizing or prohibiting DFI’s interpretation of the statute, the court declined to hold that “an administrative agency necessarily ‘oversteps’ its authority anytime it interprets a statute.”¹⁷⁷

In another case supporting broad agency powers, the court of appeals found that the Indiana Attorney General’s Office was not prevented from enforcing a nonresident’s compliance with an information request through Indiana courts because of lack of personal jurisdiction.¹⁷⁸

Conflicts between state and federal regulatory authority also can arise. In *South Haven*, the issue was whether state regulatory authority was preempted by federal authority.¹⁷⁹ The court of appeals found that a consent decree from the EPA imposing obligations on a utility to obtain an approval from the EPA before expanding its territory did not interfere with the state agency’s regulatory authority.¹⁸⁰ The court of appeals stated that the utility voluntarily assumed additional controls over its operation and the IURC was still empowered to make the ultimate decision on whether to grant the utility’s request for expansion.¹⁸¹

B. Adjudications

1. *Scope of Adjudication.*—Questions can arise regarding whether an agency has authority to take a particular action. *Christopher R. Brown, D.D.S. v. Decatur County Memorial Hospital*¹⁸² presented an interesting contrast to the court of appeals’ decision in *Jet*. In *Brown*, the Indiana Supreme Court held that the Worker’s Compensation Board cannot award prejudgment interest in the absence of express statutory authority.¹⁸³ The statute in question was silent on the issue of prejudgment interest so the Board awarded prejudgment interest because the statute did not expressly prevent it.¹⁸⁴

Although the supreme court noted the deferential standard of review for interpretations of a statute by the administrative agency charged with the statute’s enforcement, the court found that the Board’s determination was erroneous.¹⁸⁵ The court recognized that the workers compensation statute is in derogation of

175. *Id.* at 597.

176. *Id.* at 598.

177. *Id.*

178. *Everdry Mktg. & Mgmt., Inc. v. Carter*, 885 N.E.2d 6, 15 (Ind. Ct. App. 2008).

179. *In re S. Haven Sewer Works, Inc.*, 880 N.E.2d 706, 712 (Ind. Ct. App. 2008).

180. *Id.*

181. *Id.*

182. 892 N.E.2d 642 (Ind. 2008).

183. *Id.* at 644.

184. *Id.* at 646.

185. *Id.* at 650.

common law.¹⁸⁶ The court also found that the question presented called for a policy determination—and the court should be hesitant to disturb the “delicate balance the General Assembly has reached.”¹⁸⁷

In *Employee Benefit*, a company engaged in managing the funding and administration of self-funded employee benefits plans claimed the Department of Insurance lacked subject matter jurisdiction to regulate it because it was not an “insurance company” as defined by Indiana Code.¹⁸⁸ After analyzing the statutes involved, the court of appeals determined “for all practical purposes, [the company] was involved in health insurance.”¹⁸⁹ However, the court also relied upon a prior agreed entry the company had entered into with the Department to avoid license revocation and protect the “insured” and found that the Department had authority to ensure compliance with the agreement or revoke insurance licenses in the event of non-compliance.¹⁹⁰

2. *Due Process*.—“The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.”¹⁹¹ In *Miller*, the court of appeals found that a claimant for unemployment benefits had not received due process when the purpose of the hearing was different than what had been stated in a letter the claimant had received prior to the hearing.¹⁹²

The court of appeals rejected all of the arguments the appellees advanced to address the due process issue.¹⁹³ Notice of the issues to be decided was not only required under the department’s regulations, but was also a “fundamental requirement of a fair hearing.”¹⁹⁴ The court found that the notice the claimant received, which discussed whether he had been looking for work, did not adequately identify the issue of whether or not he had been terminated for just cause.¹⁹⁵

The most interesting legal argument, however, related to waiver. The appellees argued that the claimant had waived any lack of due process by “failing to lodge a formal objection” at the time of the hearing and again on appeal of the determination to the Review Board.¹⁹⁶ The court of appeals noted that parties can waive constitutional issues if they are raised for the first time on appeal.¹⁹⁷

186. *Id.* at 649.

187. *Id.*

188. *Employee Benefit Managers, Inc. of Am. v. Ind. Dep’t of Ins.*, 882 N.E.2d 230, 236 (Ind. Ct. App.), *trans. denied*, 898 N.E.2d 1217 (Ind. 2008).

189. *Id.*

190. *Id.*

191. *Miller v. Ind. Dep’t of Workforce Dev.*, 878 N.E.2d 346, 351 (Ind. Ct. App. 2007) (quoting *NOW Courier, Inc. v. Review Bd. of Ind. Dep’t of Workforce Dev.*, 871 N.E.2d 384, 387 (Ind. Ct. App. 2007)).

192. *Id.* at 354.

193. *Id.* at 351-54.

194. *Id.* at 352 (citing *FTC v. Nat’l Lead Co.*, 352 U.S. 419 (1957)).

195. *Id.* at 352-53.

196. *Id.* at 353.

197. *Id.* (citing *Hite v. Vanderburgh County Office of Family & Children*, 845 N.E.2d 175,

However, the court noted that it had “previously declined to find waiver of an issue not raised in an administrative proceeding where resolution of the issue did not require any factual determinations, and required only legal conclusions.”¹⁹⁸ The court also excused the claimant’s failure to exhaust his administrative remedies by raising the due process argument at the Review Board, because “the question presented is strictly constitutional.”¹⁹⁹ The court of appeals declined to invoke waiver, concluding that the transcript clearly showed that the claimant alerted the ALJ to his lack of notice, the issue was strictly legal, and the first time the claimant had legal counsel was on appeal.²⁰⁰

A due process argument was raised, but summarily rejected, in *Employee Benefit*.²⁰¹ An insurer contended it was denied due process when the Department of Insurance failed to hold an additional compliance hearing for the purpose of allowing the insurer to show the significant steps it was making toward compliance.²⁰² The court of appeals found that the insurer had a fair opportunity to be heard without the additional compliance hearing.²⁰³ The insurer had ample opportunities to present evidence at three prior hearings, and the insurer failed to claim that it would present dispositive evidence in a future hearing.²⁰⁴

3. *Hearsay*.—*Highland Town School Corp. v. Review Board of the Indiana Department of Workforce Development*²⁰⁵ addressed hearsay objections. The court of appeals stated that “parties who proceed pro se are afforded more leeway in an administrative context than in a judicial one.”²⁰⁶ The applicant, for example, did not have to say “hearsay” in making his objections, but he did have to clearly indicate the substantive basis of his objections.²⁰⁷ The court of appeals found that the applicant in *Highland* did not clearly indicate he was objecting on the basis of hearsay.²⁰⁸

4. *Ascertainable Standards*.—An issue regarding ascertainable standards was raised in *Construction Management*.²⁰⁹ “Decisions of administrative agencies must be based on ascertainable standards to protect against arbitrary and

180 (Ind. Ct. App. 2006)).

198. *Id.* (citing *Tokheim Corp. v. Review Bd. of Ind. Employment Sec. Div.*, 440 N.E.2d 1141, 1142 (Ind. Ct. App. 1982)).

199. *Id.* (citing *Wilson v. Bd. of Ind. Employment Sec. Div.*, 385 N.E.2d 438, 441 (Ind. 1979)).

200. *Id.* at 354.

201. *Employee Benefit Managers, Inc. of Am. v. Ind. Dep’t of Ins.*, 882 N.E.2d 230, 237 (Ind. Ct. App.), *trans. denied*, 898 N.E.2d 1217 (Ind. 2008).

202. *Id.* at 237-38.

203. *Id.* at 238.

204. *Id.* at 237.

205. 892 N.E.2d 652 (Ind. Ct. App. 2008).

206. *Id.* at 656.

207. *Id.*

208. *Id.*

209. *Ind. Dep’t of Env’tl. Mgmt. v. Constr. Mgmt. Assoc.*, 890 N.E.2d 107, 114 (Ind. Ct. App. 2008).

capricious decisions. Such standards are also necessary to give fair warning as to what factors agencies consider in making decisions.”²¹⁰ The construction company to be regulated challenged IDEM’s interpretation of a regulation, claiming IDEM expanded the definition to include a measure of ownership, operation, or proximity without the usual process of notification and adoption of the regulation.²¹¹ The court of appeals rejected this challenge, however, and found that the regulation contained all necessary guidance.²¹²

5. *Findings Sufficient to Support Judgment.*—A claimant for unemployment benefits challenged the sufficiency of the Department of Workforce Development’s findings in *Miller v. Indiana Department of Workforce Development*.²¹³ A labor agreement between the claimant and his employer stated that employees could be terminated for gross negligence.²¹⁴ The Department issued findings supporting the employee’s termination pursuant to the agreement, even though its findings indicated the employee had only been negligent.²¹⁵ The court of appeals therefore found that the Department’s findings were insufficient to support its judgment.²¹⁶

C. Administrative Collateral Estoppel

*Uylaki v. Town of Griffith*²¹⁷ presented an issue of administrative collateral estoppel. A town employee sought unemployment benefits after he was discharged.²¹⁸ The Department of Workforce Development determined that the employee had been terminated for just cause and was not eligible for benefits.²¹⁹ The employee appealed the ruling to an ALJ and to the Department’s Review Board, both of which agreed with the initial decision.²²⁰ The employee did not seek judicial review, instead, he filed a wrongful discharge action against the town.²²¹ The town contended the wrongful discharge action was precluded on the grounds of administrative collateral estoppel.²²² The trial court and court of appeals agreed.²²³

The court of appeals applied a four part test to determine whether

210. *Id.* (citing *State Bd. of Tax Comm’rs v. New Castle Lodge # 147, Loyal Order of Moose, Inc.*, 765 N.E.2d 1257, 1264 (Ind. 2002)).

211. *Id.* at 114.

212. *Id.* at 114-15.

213. 878 N.E.2d 346, 349 (Ind. Ct. App. 2007).

214. *Id.* at 349-50.

215. *Id.* at 356.

216. *Id.* at 356-57.

217. 878 N.E.2d 412 (Ind. Ct. App. 2007).

218. *Id.* at 413.

219. *Id.*

220. *Id.* at 413-14.

221. *Id.* at 414.

222. *Id.*

223. *Id.* at 414-15.

administrative collateral estoppel applies to bar a plaintiff's claim. The test considers:

1) whether the issues sought to be estopped were within the statutory jurisdiction of the agency; 2) whether the agency was acting in a judicial capacity; 3) whether both parties had a fair opportunity to litigate the issues; 4) whether the decision of the administrative tribunal could be appealed to a judicial tribunal.²²⁴

The only factor which gave the court of appeals any pause was whether the employee "had a fair opportunity to litigate the issue of whether [he] was discharged for just cause."²²⁵ The court of appeals found there was "no indication that [the employee] was prevented from submitting any evidence or calling witnesses on his behalf," and therefore had a fair opportunity to litigate.²²⁶

D. Minutes/Records

The court of appeals held that an administrative agency could supplement its minutes by affidavit in a declaratory judgment action.²²⁷ Although the court cited the black letter law that "[i]n general, boards and commissions speak or act officially only through the minutes and records made at duly organized meetings,"²²⁸ the court found that evidence that is introduced to "supplement the minutes is properly admissible."²²⁹

E. Correcting Errors

Although there is no statute directly authorizing a zoning board to correct clerical errors in its orders, the court of appeals applied general administrative law principles, including those contained in the AOPA, to hold that a zoning board can correct clerical errors.²³⁰

F. Estoppel

Two cases concerning estoppel issues arose during the review period. In *Terra Nova Dairy, LLC v. Wabash County Board of Zoning*,²³¹ an owner of a dairy alleged a BZA should be equitably estopped from imposing certain

224. *Id.* at 414 (citing *McClanahan v. Remington Freight Lines, Inc.* 517 N.E.2d 390, 394 (Ind. 1988)).

225. *Id.*

226. *Id.* at 415.

227. *Pressley v. Newburgh Town Council*, 887 N.E.2d 1012, 1016 (Ind. Ct. App. 2008).

228. *Id.* (citing *Borsuk v. Town of St. John*, 820 N.E.2d 118, 123 (Ind. 2005)).

229. *Id.* (quoting *Borsuk*, 820 N.E.2d at 123).

230. *Burcham v. Metro. Bd. of Zoning Appeals Div. I of Marion County*, 883 N.E.2d 204, 215-16 (Ind. Ct. App. 2008).

231. 890 N.E.2d 98 (Ind. Ct. App. 2008).

requirements of a zoning ordinance.²³² Despite the fact that the dairy had received a copy of an outdated ordinance from the BZA director, the court of appeals held that the BZA was not equitably estopped.²³³ The court reasoned that the dairy, as property owner, is ““charged with knowledge of the zoning ordinance that affects [its] property.””²³⁴ The court also found that the dairy did not rely on the information in the outdated ordinance.²³⁵

A different result was reached in *City of Charlestown Advisory Planning Commission v. KBJ, L.L.C.*²³⁶ A city planning commission approved plans for a subdivision that was within the two-mile fringe of the city, even though the plans did not comply with the city zoning ordinance.²³⁷ A few months later, the subdivision was annexed into the city.²³⁸ The developer of the subdivision subsequently sought approval of some minor changes of the subdivision plan, and the Planning Commission approved the replat.²³⁹ After litigation arose between the developer and the City which revealed that neither party had a copy of the original plat, the developer submitted another plat for approval.²⁴⁰ The Planning Commission refused to approve the plat because it did not comply with the city zoning ordinance.²⁴¹

The court of appeals found that this was one of the rare times that a government entity was equitably estopped from asserting that the subdivision plans did not comply with the city ordinance.²⁴² The court of appeals distinguished *Equicor Development Inc. v. Westfield-Washington Township Plan Commission*, because that case involved approval of “similarly situated” non-conforming plats, rather than past approval of the same non-conforming plat.²⁴³ It was also significant to the court that over thirty homes in the subdivision had already been built.²⁴⁴

The court also rejected the Planning Commission’s argument that it lacked subject matter jurisdiction to approve the original plat, characterizing the Commission’s action as a legal error that the Commission failed to timely challenge.²⁴⁵

232. *Id.* at 105.

233. *Id.* at 105-06.

234. *Id.* at 105 (quoting *Story Bed & Breakfast L.L.P. v. Brown County Area Plan Comm’n*, 819 N.E.2d 55, 64 (Ind. 2004)).

235. *Id.* at 106.

236. 879 N.E.2d 599 (Ind. Ct. App. 2008).

237. *Id.* at 600.

238. *Id.*

239. *Id.* at 600-01.

240. *Id.* at 601.

241. *Id.*

242. *Id.* at 603.

243. *Id.* at 602-03 (citing *Equicor Dev. Inc. v. Westfield-Washington Twp. Plan Comm’n*, 758 N.E.2d 34 (Ind. 2001)).

244. *Id.* at 603.

245. *Id.* at 602-03.

G. Attorney Fees

A developer in *City of Charlestown* sought attorney fees against a planning commission. The court of appeals held that the developer was not entitled to attorney fees under Indiana Code section 36-7-4-1010(a).²⁴⁶ The court of appeals held that the statute referred only to costs, which does not encompass attorney fees.²⁴⁷

III. INDIANA'S OPEN DOOR LAW

Indiana's Open Door Law provides that "official action" must be conducted at an open meeting.²⁴⁸ "The purpose of Indiana's Open Door Law is to ensure that the 'official action of public agencies' is conducted openly so that the general public may be fully informed."²⁴⁹ Several cases concerning Indiana's Open Door Law arose during the survey period, however, each illustrates how difficult it is to reverse agency action.

In *Thornberry v. City of Hobart*²⁵⁰ a police officer appealed the decision by the Hobart Public Works & Safety Board to terminate his employment.²⁵¹ The Board held evidentiary hearings on three dates, but on a subsequent date, two members of the Board met and listened to forty-five minutes of audio tape from one of the prior public hearings.²⁵² The Public Access Counselor determined that the Board members' meeting amounted to an "executive session" that had not properly been noticed under the Open Door Law.²⁵³

The Board subsequently reconsidered the matter at a properly noticed executive session and a public meeting and reached the same decision to terminate the police officer.²⁵⁴ The trial court found that there had been a technical violation of the Open Door Law, but upheld the Board's decision to terminate the police officer.²⁵⁵ The court of appeals affirmed.²⁵⁶

The burden of proof is with the plaintiff to show that final action should be voided.²⁵⁷ In *Thornberry*, the court of appeals found that "voiding the final

246. *City of Charlestown Advisory Planning Comm'n v. KBJ, L.L.C.*, 879 N.E.2d 599, 604 (Ind. Ct. App. 2008).

247. *Id.*

248. IND. CODE § 5-14-1.5-2(d)(5)-(6) (2005).

249. *Lake County Trust*, 883 N.E.2d at 135 (quoting *City of Gary v. McCrady*, 851 N.E.2d 359, 365 (Ind. Ct. App. 2006)).

250. 887 N.E.2d 110 (Ind. Ct. App.), *trans. denied*, 898 N.E.2d 1226 (Ind. 2008).

251. *Id.* at 113.

252. *Id.* at 115.

253. *Id.*

254. *Id.*

255. *Id.* at 116.

256. *Id.* at 118.

257. *Id.* at 117; *see also* IND. CODE § 5-14-1.5-7(d) (2005) (discussing factors on which a reviewing court should rely).

action would merely require the Board to reconsider the same evidence for a third time . . . [and] would only serve to impose punishment at the public's expense for a technical violation of the Open Door Law."²⁵⁸

In another case concerning a police officer, *Guzik v. Town of St. John*,²⁵⁹ the officer who was accused of misconduct alleged an open door violation when the notice of the Police Commission's executive session did not indicate that job performance evaluations and an individual's status as an employee would be the subject of the executive session.²⁶⁰ The Police Commission subsequently notified the public of the executive session and prepared minutes that noted the omission of the additional subject matter of the meeting.²⁶¹ The Police Commission also held another special meeting, during which it advised the public of the information received and the action that was taken during the executive session.²⁶²

The court of appeals did not determine whether any technical violation of the Open Door Law had occurred, but instead found that any violation was cured by the Police Commission's subsequent actions.²⁶³ Any violation "did not affect the substance of any decisions, policies, or final actions because none were made, established, or taken" during the executive session.²⁶⁴

The court of appeals did not address whether a due process violation had occurred in *Guzik* because the police officer had no notice that he was to be accused of misconduct and had no legal representation at the executive session.²⁶⁵ The court of appeals did reject the police officer's claims of due process violations founded on Indiana Code section 36-8-9-4(c) and a claim that his resignation was a product of duress.²⁶⁶

IV. STATUTORY CHANGES

A few statutory changes to AOPA, the Open Door Law or Open Records Act took effect during the survey period. Most of the changes are clarifications, such as those in Indiana Code sections 4-21.5-3.5-8, 4-21.5-4-5 and 4-21.5-7-5. The Open Records Act had the most changes. The Open Door and Open Records Act were amended to include the ports of Indiana and State Department of

258. *Thornberry*, 887 N.E.2d at 118.

259. 875 N.E.2d 258 (Ind. Ct. App. 2007), *trans. denied*, 891 N.E.2d 47 (Ind. 2008).

260. *Id.* at 270.

261. *Id.* at 270-71.

262. *Id.* at 271.

263. *Id.* at 271-72.

264. *Id.* at 272.

265. *Id.* at 267-68.

266. *Id.* at 268.

Agriculture in the exemption regarding negotiations with industrial or commercial prospects.²⁶⁷ Other changes to the Open Records Act included a new definition of “offender,”²⁶⁸ including of the Indiana Horse Racing Commission as a public agency,²⁶⁹ and a definition for the actual cost of copying.²⁷⁰

267. IND. CODE §§ 5-14-1.5-6.1, 5-14-3-4(b)(5)(a), 5-14-3-4.9 (2005 & Supp. 2008).

268. *Id.* § 5-14-3-2(i).

269. *Id.* § 5-14-3-2(m)(10).

270. *Id.* § 5-14-3-8(d)(2).

DEVELOPMENTS IN INDIANA APPELLATE PROCEDURE: RULE AMENDMENTS, NOTABLE CASE LAW, AND TIPS FOR APPELLATE PRACTITIONERS

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INTRODUCTION

The Indiana Rules of Appellate Procedure (Appellate Rules) were adopted in 2000. Each year, the Appellate Rules are defined, refined, and enhanced by the Indiana Supreme Court (supreme court) and the Indiana Court of Appeals (court of appeals) through rule amendments and appellate decisions. This Article tracks notable developments in appellate procedure between October 1, 2007 and September 30, 2008, by summarizing rule amendments, examining court opinions affecting appellate procedure, and synthesizing the case law to provide tips to practitioners for improving their appellate practice.

I. RULE AMENDMENTS

This past year the supreme court made substantive amendments to Appellate Rules 9, 15, 23, 53, and Form 15-1.¹ The supreme court added Appellate Rule 14.1, which creates a new expedited process for certain appeals involving juveniles.² The supreme court also added Administrative Rule 9(G), which addresses court records excluded from public access in appellate proceedings.³ All of these amendments went into effect on January 1, 2009.

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1. See Order Amending Indiana Rules of Appellate Procedure, No. 94S00-0810-MS-15 (Ind. Oct. 6, 2008), available at <http://www.in.gov/judiciary/rule-amendments/2008/1008-appellate.pdf>; Order Amending Appellate Rules, No. 94S00-0809-MS (Ind. Sept. 9, 2008), available at <http://www.in.gov/judiciary/orders/rule-amendments/2008/0908-appellate.pdf>.

2. See Order Amending Indiana Rules of Trial Procedure and Indiana Rules of Appellate Procedure, No. 94S00-0801-MS-15 (Ind. Jan. 6, 2009), available at <http://www.in.gov/judiciary/orders/rule-amendments/2009/0109-trproapppro.pdf>.

3. See Order Amending Indiana Administrative Rules, No. 94S00-0810-MS-15 (Ind. Oct. 6, 2008), available at <http://www.in.gov/judiciary/orders/rules-amendments/2008/1008-admin.pdf>.

A. Appellate Rule 23—The Rotunda Filing Drop Box

The supreme court amended Appellate Rule 23 to include the location of the rotunda filing drop box in the State House. Specifically, amended Appellate Rule 23(A)(1) provides:

All papers will be deemed filed with the Clerk when they are: (1) personally delivered to the Clerk (which, when the Clerk's office is open for business, shall mean personally tendering the papers to the Clerk or the Clerk's designee; and at all other times (unless the Clerk specifies otherwise) shall mean properly depositing the papers into the "rotunda filing drop box" located in the vestibule of the east second-floor entrance to the State House).⁴

B. Cases Involving Records Excluded from Public Access

The majority of the supreme court's amendments to the Appellate Rules affect the requirements for cases involving records excluded from public access. The supreme court amended Appellate Rule 9, which governs the initiation of an appeal.⁵ Amended Appellate Rule 9(J) directs parties to file documents and information excluded from public access in accordance with Indiana Trial Rule 5(G) and Administrative Rule 9(G)(4).⁶

The supreme court also amended Appellate Rule 15, which outlines the requirements for an appellant's case summary.⁷ Pursuant to amended Appellate Rule 15, an appellant must set forth in its appellant's case summary "[w]hether or not all, or any portion, or none of the court records were sealed or excluded from public access by court order."⁸ The party must also certify that it "has reviewed and complied, and will continue to comply, with the requirements of Indiana Administrative Rule 9(G)(4) to the extent it applies to the appeal."⁹ Moreover, the party must attach "[a] copy of all trial court entries relating to the sealing of any court records excluded from public access."¹⁰ The supreme court also amended the designated form for the appellant's case summary to add areas for the appellant to include this information.¹¹

4. IND. APP. R. 23(A).

5. Order Amending Indiana Rules of Appellate Procedure, No. 94S00-0810-MS-15, *supra* note 1.

6. IND. APP. R. 9(J). Administrative Rule 9(G)(4) is a new provision governing access to court records in appellate proceedings and will be discussed momentarily. *See infra* notes 11-17 and accompanying text.

7. Order Amending Indiana Rules of Appellate Procedure, No. 94S00-0810-MS-15, *supra* note 1.

8. IND. APP. R. 15(C)(2)(k).

9. IND. APP. R. 15(C)(4)(i).

10. IND. APP. R. 15(D)(7).

11. Order Amending Indiana Rules of Appellate Procedure, No. 94S00-0810-MS-15, *supra* note 1 (amending IND. FORM. APP. 15-1).

Additionally, the supreme court added Appellate Rule 53(H), which governs the procedures for oral arguments in cases with sealed records.¹² Appellate Rule 53(H) provides that “[i]n any appeal in which case records are deemed confidential or excluded from public access, the parties and their counsel shall conduct oral argument in a manner reasonably calculated to provide anonymity and privacy in accordance with the requirements of Administrative Rule 9(G)(4).”¹³

Many of the amended Appellate Rules reference Administrative Rule 9(G)(4). The supreme court added¹⁴ this provision to the Administrative Rules to place certain obligations on parties in appellate proceedings regarding access to court records. Specifically, Administrative Rule 9(G)(4) provides:

(4) *Appellate Proceedings.* In appellate proceedings, parties, counsel, the courts on appeal, and the Clerk of the Supreme Court, Court of Appeals, and Tax Court (“Clerk”) shall have the following obligations.

(a) *Cases in which the entire record is excluded from public access by statute or by rule.* In any case in which all case records are excluded from public access by statute or by rule of the Supreme Court,

(i) the Clerk shall make the appellate chronological case summary for the case publicly accessible but shall identify the names of the parties and affected persons in a manner reasonably calculated to provide anonymity and privacy;^[15] and

(ii) the parties and counsel, at any oral argument and in any public hearing conducted in the appeal, shall refer to the case and parties only as identified in the appellate chronological case summary and shall not disclose any matter excluded from public access.

(b) *Cases in which a portion of the record is excluded from public access by statute or by rule.* In any case in which a portion (but less than all) of the record in the case has been excluded from public access by statute or by rule of the Supreme Court,

(i) the parties and counsel shall not disclose any matter excluded from public access in any document not itself excluded from

12. *Id.* (adding IND. APP. R. 53(H)).

13. IND. APP. R. 53(H).

14. Order Amending Indiana Administrative Rules, No. 94S00-0810-MS-15, *supra* note 3.

15. This portion of the Rule was likely added in response to the Clerk of the Court’s interpretation of Administrative Rule 9(G)(1)(b)(i), which was cited as support for the decision to remove the entire online appellate docket for certain appeals involving juveniles. *See* Posting of Marcia Oddi to Indiana Law Blog, <http://www.indianalawblog.com/> (Oct. 8, 2008, 19:34 EST).

public access; to the extent it is necessary to refer to excluded information in briefs or other documents that are not excluded from public access, the reference shall be made in a separate document filed in compliance with Trial Rule 5(G); and

(ii) the parties, counsel, and the Clerk shall have the respective obligations set forth in (a)(i) and (a)(ii) to the extent necessary to comply with the statute or rule.

(c) *Cases in which any public access is excluded by trial court order.* In any case in which all or any portion of the record in the case has been excluded from public access by trial court order ("TCO"),

(i) (A) the appellant shall provide notice in the appropriate place on the appellant's case summary (see Ind. Appellate Rule 15) that all or a portion of the record in the case has been excluded from public access by TCO, and attach to the appellant's case summary all TCOs concerning each exclusion; and

(B) the parties, counsel, and the Clerk shall have the respective obligations set forth in (a)(i), (a)(ii), and (b)(i) to the extent necessary to comply with the TCO.

(ii) if the notice and supporting orders referred to in (i)(A) are supplied, then the Clerk shall exclude the information from public access to the extent necessary to comply with the TCO unless the court on appeal determines that

(A) the TCO was improper or is no longer appropriate,

(B) public disclosure of the information is essential to the resolution of litigation, or

(C) disclosure is appropriate to further the establishment of precedent or the development of the law;

(iii) any party may supplement or challenge the appellant's notice or attachments supplied under (i)(A) or request a determination from the court on appeal under (ii); and

(iv) if the appellant does not notify the court on appeal that all or a portion of the record in the case has been excluded from public access by TCO, and attach to the appellant's case summary all TCOs concerning each exclusion, as required by (i)(A),

(A) the Clerk shall be under no obligation to exclude the information from public access; and

(B) the appellant and appellant's counsel shall be subject to sanctions.

(d) Orders, decisions, and opinions issued by the court on appeal shall be publicly accessible, but each court on appeal should endeavor to exclude the names of the parties and affected persons, and any other matters excluded from public access, except as essential to the resolution of litigation or appropriate to further the establishment of precedent or the development of the law.¹⁶

The supreme court's extensive amendments to the Appellate and Administrative Rules for cases involving records excluded from public access demonstrate the court's commitment to delineating a procedure for cases of this nature. Additionally, the intricacies of the amendments make one thing clear: Appellate practitioners representing parties in cases with records excluded from public access must be careful to comply with the rules or risk being subject to sanctions.¹⁷

C. Appellate Rule 14.1—Juvenile “Rocket Docket”

Effective January 1, 2009, the supreme court issued an order adding Appellate Rule 14.1, which establishes an expedited appellate review process for certain cases involving appeals from juvenile proceedings.¹⁸ Specifically, Appellate Rule 14.1 applies to appeals authorized by Indiana Code sections 31-34-4-7(f), 31-34-19-6.1(f), 31-37-5-8(g), and 31-37-18-9(d), which deal with determinations regarding Children in Need of Services (CHINS) and juvenile delinquency.¹⁹ In these cases, the Department of Child Services (DCS) must file a notice of expedited appeal with the trial court clerk within five business days of the trial court's order of placement or services.²⁰ The supreme court added Form 14.1-1 for this purpose.²¹ Any party who receives the notice of expedited appeal shall have five business days from service to file an appearance.²² Failure to do so removes that party from the appeal.²³

Appellate Rule 14.1(C) provides that the “completion of the Transcript and

16. IND. ADMIN. R. 9(G)(4).

17. See IND. ADMIN. R. 9(G)(4)(c)(iv)(B).

18. Order Amending Indiana Rules of Trial Procedure and Indiana Rules of Appellate Procedure, No. 94S00-0801-MS-15, *supra* note 2.

19. IND. APP. R. 14.1(A).

20. IND. APP. R. 14.1(B)(1).

21. Order Amending Indiana Rules of Trial Procedure and Indiana Rules of Appellate Procedure, No. 94S00-0801-MS-15, *supra* note 2 (adding IND. FORM APP. 14.1-1).

22. IND. APP. R. 14.1(B)(5).

23. *Id.*

the Record on Appeal shall take priority over all other appeal transcripts and records.”²⁴ Consequently, the assembly of the clerk’s record shall be completed and the transcript filed within ten business days after the filing of the notice of appeal.²⁵ On the eleventh business day following the filing of the transcript, the trial court clerk shall transmit the transcript, and failure to meet this deadline shall require the trial court clerk to show cause to the court of appeals why he or she should not be held in contempt.²⁶

Appellate Rule 14.1(D) provides that any party may file a memorandum in narrative form and exempts the memorandum from various formatting requirements found in other appellate rules.²⁷ Memoranda shall not exceed ten pages.²⁸ DCS shall have five business days from the filing of the notice of completion of transcript to file a memorandum stating why the trial court’s decision should be reversed, and any responding party shall have five business days after DCS has filed its memorandum to file a responsive memorandum.²⁹ No reply memorandum³⁰ or extension of time is allowed.³¹ Additionally, a party may not seek rehearing of an appellate decision.³² A petition to transfer to the supreme court must be filed within five business days after the adverse decision of the court of appeals, and the petition “shall not exceed one (1) page in length.”³³

Appellate Rule 14.1 will certainly expedite the appellate process for the applicable juvenile cases. However, it will be interesting to find out how attorneys handling these cases adapt to its strict deadlines with no possibility for extensions of time.

II. CASE LAW INTERPRETING THE APPELLATE RULES

The vast majority of case law applying the Appellate Rules is handed down by the court of appeals. While the supreme court occasionally has an opportunity to interpret the Appellate Rules, the sheer number of cases the court of appeals tackles each year gives it more chances to construe the Appellate Rules.

A. *The Appellate Rules Trump*

The court of appeals issued two opinions this year reconciling conflicts between the Appellate Rules and either the Trial Rules or a statute. In both cases, the court of appeals concluded that the Appellate Rules trumped the

24. IND. APR. R. 14.1(C)(1).

25. *Id.*

26. IND. APP. R. 14.1(C)(3).

27. IND. APP. R. 14.1(D)(1).

28. IND. APP. R. 14.1(D)(2).

29. IND. APP. R. 14.1(D)(3).

30. IND. APP. R. 14.1(D)(5).

31. IND. APP. R. 14.1(E).

32. IND. APP. R. 14.1(F).

33. IND. APP. R. 14.1(H).

conflicting provision.

In *Marlett v. State*,³⁴ the State argued on cross-appeal that Marlett's notice of appeal was untimely and, thus, his appeal should be dismissed.³⁵ The trial court sentenced Marlett for his criminal conviction on December 1, 2006.³⁶ Therefore, Marlett's notice of appeal was due to be filed on or before January 2, 2007.³⁷ Although Marlett had documentation that he mailed his notice of appeal to the trial court on December 29, 2006, it was not sent by registered, certified, or express mail, and the trial court did not receive the notice of appeal until January 3, 2007.³⁸

In addressing the State's cross-appeal, the court of appeals noted that Trial Rule 5(F)(3) requires that in order for a filing by mail to be deemed to have occurred on the date of mailing, the mail must be sent by registered, certified, or express mail.³⁹ By contrast, however, Appellate Rule 23(A)(2) provides, "All papers will be deemed filed with the Clerk when they are . . . deposited in the United States Mail, postage prepaid, properly addressed to the Clerk"⁴⁰ Consequently, the court of appeals noted that Marlett's notice of appeal was timely pursuant to the Appellate Rules because the filing date would be December 29, 2006, but that his notice was untimely pursuant to the Trial Rules because it was not sent by registered, certified, or express mail and, thus, was not filed until January 3, 2007.

The court of appeals held that "for purposes of determining the timeliness of a filing required by the Appellate Rules, the filing provisions of those rules trump those of the Trial Rules."⁴¹ Although the court acknowledged that "the Clerk" referred to in Appellate Rule 23(A) included the Clerk of the Supreme Court, court of appeals, and Tax Court but not the trial court clerk, the court held that "[n]onetheless, in crafting the Appellate Rules a conscious decision was made that filings made by any type of United States Mail service would be deemed filed on the date of mailing, so long as postage was paid and it was addressed correctly."⁴² Because the notice of appeal is a requirement of appellate practice and not trial practice, the court concluded that "[a]pplying Appellate Rule 23(A)(2) in this case would not undermine the goals of strictly enforcing time limits for notice of appeals, among which are to ensure the expeditious processing of appeals and to ensure the finality of judgments."⁴³ Therefore, the

34. 878 N.E.2d 860 (Ind. Ct. App. 2007), *trans. denied*, 891 N.E.2d 43 (Ind. 2008).

35. *Id.* at 863-64.

36. *Id.* at 863.

37. *Id.* at 864 (citing IND. APP. R. 25(A)-(B)). Although the thirtieth day after Marlett's sentence fell on December 31, 2006, both it and the following day were non-business days. Thus, Marlett's notice of appeal was not due until January 2, 2007.

38. *Id.*

39. *Id.* (citing IND. TRIAL R. 5(F)(3)).

40. *Id.* (quoting IND. APP. R. 23(A)(2)).

41. *Id.*

42. *Id.*

43. *Id.*

court of appeals held that Marlett's notice of appeal was timely and declined to dismiss his appeal.⁴⁴

In *Crist v. South-West Lake Maxinkuckee Conservancy District*,⁴⁵ the court of appeals reconciled a conflict between the Appellate Rules and Indiana Code section 14-33-2-28, regarding whether the court of appeals or the supreme court had jurisdiction over a direct appeal from a trial court order establishing a conservancy district.⁴⁶ Indiana Code section 14-33-2-28 provides that an order establishing a conservancy district "may be appealed to the supreme court within thirty (30) days."⁴⁷ However, the court of appeals noted that Appellate Rule 4 grants the supreme court both mandatory and discretionary jurisdiction, but "[a]n appellant seeking to have the Supreme Court exercise discretionary jurisdiction over a direct appeal pursuant to [Appellate] Rule 4(A)(2) must file a motion with our Supreme Court pursuant to Appellate Rule 56."⁴⁸ Additionally, the court noted that "Appellate Rule 5 provides that '[e]xcept as provided in Rule 4, the Court of Appeals shall have jurisdiction in all appeals from Final Judgments of Circuit, Superior, Probate, and County Courts, *notwithstanding any law, statute or rule providing for appeal directly to the Supreme Court of Indiana.*'"⁴⁹

The court of appeals emphasized that the case "[did] not qualify for mandatory supreme court review pursuant to Appellate Rule 4(A)(1)."⁵⁰ Moreover, the court noted that the trial court's order establishing the conservancy district was a final judgment but the appellant did not file a motion seeking discretionary review with the supreme court pursuant to Appellate Rule 56.⁵¹ Therefore, the court held that "[w]hile we agree that Indiana Code section 14-33-2-28 clearly states that an appellant can appeal the trial court's order establishing a conservancy district directly to our Supreme Court, Rule 5(A) trumps that statute and gives our court jurisdiction."⁵² As support for its holding, the court of appeals cited Indiana Code section 34-8-1-3, which provides that rules adopted by the supreme court ultimately control, and "all laws in conflict with the supreme court's rules have no further force or effect."⁵³ Consequently, the court of appeals concluded that it had jurisdiction over the direct appeal pursuant to Appellate Rule 5(A) and addressed the merits of the case.

B. The Effect of Trial Rule 53.3's "Deemed Denied" Provision on Appeal

Trial Rule 53.3 provides that if a trial court does not set a hearing on a

44. *Id.*

45. 875 N.E.2d 222 (Ind. Ct. App. 2007), *trans. denied*, 891 N.E.2d 40 (Ind. 2008).

46. *Id.* at 227.

47. *Id.* (quoting IND. CODE § 14-33-2-28 (2004)).

48. *Id.*

49. *Id.* (quoting IND. APP. R. 5).

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.* (citing IND. CODE § 34-7-1-3).

motion to correct error within forty-five days of the motion or fails to rule on a motion to correct error within thirty days after the hearing (or forty-five days after it was filed if no hearing is required), the pending motion “shall be deemed denied [and a]ny appeal shall be initiated by filing the notice of appeal under Appellate Rule 9(A) within thirty (30) days after the Motion to Correct Error is deemed denied.”⁵⁴ During the reporting term, the supreme court and the court of appeals had three opportunities to construe and apply the effect of the Rule 53.3 “deemed denied” provision on pending appeals.

In *HomeEq Servicing Corp. v. Baker*,⁵⁵ the defendants’ motion to correct error was deemed denied pursuant to Trial Rule 53.3 because the trial court did not rule on it within thirty days of the hearing.⁵⁶ However, the trial court attempted to belatedly grant the defendants’ motion to correct error eight days after the deadline had passed.⁵⁷ Plaintiff appealed the trial court’s attempt to grant the motion and argued that it had already been deemed denied. The defendants cross-appealed, asserting error in the denial of their motion.⁵⁸

To resolve the parties’ dispute, the supreme court emphasized a footnote from a previous opinion,⁵⁹ *Cavinder Elevators, Inc. v. Hall*.⁶⁰

If the trial court belatedly grants a motion to correct error before the party filing the motion to correct error initiates an appeal but during the time period within which such party is entitled to appeal from the deemed denial, the party may assert as cross-error the issues presented in its “deemed denied” motion to correct error.⁶¹

The *HomeEq* court reasoned that “[t]his exception recognizes the probable correctness of a trial court’s decision modifying its own previous ruling and permits the proponent of the belatedly-granted motion to delay initiating a possibly unnecessary appeal until ascertaining whether the opponent of the motion chooses to acquiesce in the belated ruling.”⁶² In other words, the exception outlined in *Cavinder Elevators* “permit[s] the defendants to initially forego commencing an appeal to see if the plaintiff would agree with the merits of the trial court’s belated ruling and choose not to assert its invalidity on grounds of tardiness.”⁶³ However, if the opponent of the motion appeals the trial court’s belated grant of the motion, the proponent of the motion is entitled to proceed by cross-appeal to obtain appellate review of the merits of the issues

54. IND. TRIAL R. 53.3(A).

55. 883 N.E.2d 95 (Ind. 2008).

56. *Id.* at 96-97.

57. *Id.* at 96.

58. *Id.* at 96-97.

59. *Id.* at 97.

60. 726 N.E.2d 285, 289 n.4 (Ind. 2000).

61. *HomeEq*, 883 N.E.2d at 97 (quoting *Cavinder*, 726 N.E.2d at 289 n.4).

62. *Id.*

63. *Id.*

raised in the motion.⁶⁴

In *Paulsen v. Malone*,⁶⁵ the plaintiff filed a motion to correct error after the trial court entered a defense verdict.⁶⁶ The trial court held a hearing on the motion and, after the hearing, made an entry on the Chronological Case Summary that the plaintiff would submit additional authority for the trial court's consideration.⁶⁷ Although the plaintiff ultimately filed supplemental authority and the defendant filed a response, the trial court did not grant the plaintiff's motion to correct error until sixteen days after it had been deemed denied by Trial Rule 53.3.⁶⁸

The defendant appealed the trial court's belated grant of the motion, arguing that the plaintiff's motion had been deemed denied pursuant to Trial Rule 53.3.⁶⁹ Although the plaintiff did not dispute the language of the rule, she argued that the thirty-day time period did not begin to run until the additional authority and response had been submitted to the trial court.⁷⁰ In other words, the plaintiff claimed that the trial court had essentially kept the hearing record open by allowing the submission of additional authority, stopping the Trial Rule 53.3 clock.⁷¹ The court of appeals disagreed, citing the specific language of the rule and concluding that

[t]he plain language of this rule states that the allotted time period to rule on the motion begins to run at the conclusion of the hearing itself, and not at some later date. Nothing in the language of this rule suggests that the matter is still being "heard" after the hearing terminates and while supplemental authority is being offered.⁷²

Additionally, the court noted that pursuant to Trial Rule 53.3(D), "the trial court was capable of granting itself an additional thirty days to rule, if, after reviewing the parties' post-hearing submissions, the trial court deemed such an extension was necessary."⁷³ Because the trial court did not do so and failed to rule on the motion to correct error within the confines of Trial Rule 53.3, the court of appeals held that the motion was deemed denied thirty days after the hearing and, consequently, the "trial court lost its power to rule on the motion to correct error."⁷⁴

In *Johnson v. Johnson*,⁷⁵ the court of appeals addressed the effect of Trial

64. *Id.*

65. 880 N.E.2d 312 (Ind. Ct. App. 2008).

66. *Id.* at 313.

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.* at 314.

71. *Id.*

72. *Id.* at 314-15.

73. *Id.* at 315.

74. *Id.*

75. 882 N.E.2d 223 (Ind. Ct. App. 2008).

Rule 53.3 on a trial court's *nunc pro tunc* order granting a motion to correct error.⁷⁶ In *Johnson*, the petitioner filed a motion to correct error regarding the trial court's dissolution decree.⁷⁷ A magistrate judge presided over the hearing on the motion and informed the parties at the end of the hearing that she was going to grant the petitioner's motion.⁷⁸ However, the trial court did not enter an order granting the motion until seventy-nine days after the hearing, when it issued a *nunc pro tunc* order amending the dissolution decree in favor of the petitioner; accordingly, the respondent appealed.⁷⁹

Before addressing the effect of Trial Rule 53.3 on the motion to correct error, the court of appeals held that although the magistrate conveyed her intent to grant the motion at the end of the hearing, she "did not have the authority to actually grant [the] motion or enter a final appealable order [pursuant to Indiana Code sections 33-23-5-8 and 33-23-5-9]."⁸⁰ Turning to the trial court's *nunc pro tunc* order entered seventy-nine days after the hearing, the court of appeals noted that the trial court had not extended the ruling deadline pursuant to Trial Rule 53.3(D) and followed the *Paulsen* court's holding that "the thirty-day 'time period to rule on the motion begins to run at the conclusion of the hearing itself, not at some later date.'"⁸¹ Because there was no evidence that the trial court granted the motion within thirty days of the hearing, the court of appeals concluded that the trial court could not issue a *nunc pro tunc* order seventy-nine days after the hearing.⁸² The court of appeals acknowledged that "the facts of this case require us to choose between the lesser of two evils[, . . and because Trial] Rule 53.3 may create numerous potholes into which a litigant can stumble, the burden should be on the party seeking to correct the trial court's alleged error to preserve its claims."⁸³

C. Appellate Attorney Fees

1. *Applying Appellate Rule 66(E).*—Appellate Rule 66(E) provides that "[t]he Court may assess damages if an appeal, petition, or motion, or response, is frivolous or in bad faith. Damages shall be in the Court's discretion and may

76. *Id.* at 225.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.* at 226.

81. *Id.* at 227 (quoting *Paulsen v. Malone*, 880 N.E.2d 312, 314 (Ind. Ct. App. 2008)).

82. *Id.* at 227-28.

83. *Id.* at 229. Judge Darden authored a dissenting opinion arguing that he "would not find Trial Rule 53.3 to have a dispositive effect here . . . [because] the parties understood that the trial court had granted [the petitioner's] motion." *Id.* at 229-30 (Darden, J., dissenting). The majority responded by noting that "[w]hile we sympathize with the dissent's penchant for equity, we cannot disregard the magistrate's lack of authority to issue a final ruling and, thus, must conclude that the trial court abused its discretion by issuing an untimely *nunc pro tunc* order." *Id.* at 229 n.3.

include attorneys' fees. The Court shall remand the case for execution."⁸⁴ During the reporting term, the court of appeals had numerous opportunities to deny parties' requests for appellate attorney fees.⁸⁵ However, it chose to award fees in some cases.⁸⁶

In *Lesjak v. New England Financial*,⁸⁷ the court of appeals noted that appellate attorney fees are typically awarded for either substantive or procedural bad faith.⁸⁸ "Substantive bad faith 'implies the conscious doing of a wrong because of dishonest purpose or moral obliquity.'"⁸⁹ "Procedural bad faith is present 'when a party flagrantly disregards the form and content requirements of the Rules of Appellate Procedure, [and] omits and misstates relevant facts appearing in the record'"⁹⁰ The court of appeals found the substance of the appeal to be moot because, although the appellee had represented to the trial court that it could not engage in arbitration because the claim was not arbitrable, the parties began arbitration during the pendency of the appeal.⁹¹ After analyzing the appellees' conduct before the trial court and court of appeals, the court concluded:

We have little trouble concluding that [the appellee] has engaged in both procedural and substantive bad faith during this appeal, if not the entire litigation. After fighting arbitration for months and informing the trial court that, in fact, arbitration . . . was impossible, [the appellee] dramatically reversed course and simply initiated the arbitration on the eve of the due date of its appellee's brief. Although it likely hoped that it would not have to incur the financial and temporal expense of drafting an appellate brief, [the appellee] was ordered to do so by this court. When, however, the final due date arrived, [the appellee] defied this court's order and filed a motion for extension of time rather than a brief, which arrived a week later. And in the end, after [the appellant] has incurred over \$19,000 in attorney fees seeking to compel arbitration[, the appellee] adds a final insult to injury by suggesting that [the appellant] should be grateful for this outcome.⁹²

84. IND. APP. R. 66(E).

85. See *Rovai v. Rovai*, 891 N.E.2d 177, 181 n.4 (Ind. Ct. App. 2008), *trans. granted*, 898 N.E.2d 1231 (Ind. 2008); *Pardue v. Smith*, 875 N.E.2d 285, 292 (Ind. Ct. App. 2007); *Pramco III, LLC v. Yoder*, 874 N.E.2d 1006, 1014-15 (Ind. Ct. App. 2007); *Wholesalers, Inc. v. Hobson*, 874 N.E.2d 622, 627 (Ind. Ct. App. 2007).

86. See *infra* notes 87-116 and accompanying text.

87. 879 N.E.2d 1129 (Ind. Ct. App. 2008).

88. *Id.* at 1132-35.

89. *Id.* at 1133 (quoting *Wallace v. Rosen*, 765 N.E.2d 192, 201 (Ind. Ct. App. 2002)).

90. *Id.* (quoting *Wallace*, 765 N.E.2d at 201).

91. *Id.* at 1134-35.

92. *Id.* at 1134. Additionally, the court of appeals opined that [w]hether [the appellant] is entitled to attorney fees for [the appellee's] conduct prior to this appeal is not, we think, a close call. But it is a call more appropriately made by

Consequently, the court of appeals awarded the appellant appellate attorney fees pursuant to Appellate Rule 66(E).

In *Knowledge A-Z, Inc. v. Sentry Insurance*,⁹³ the court of appeals noted that its discretion for awarding appellate attorney fees “is limited to instances ‘when an appeal is permeated with meritlessness, bad faith, frivolity, harassment, vexatiousness, or purpose of delay.’”⁹⁴ The court noted that as a general matter, it is cautious to award appellate attorney fees “because of the potentially chilling effect the award may have upon the exercise of the right to appeal.”⁹⁵ However, the court of appeals concluded that the appellant “has litigated this matter to an unreasonable extreme [and, u]nremitting to logic or sensibility, [the appellant] and its attorney trudge on.”⁹⁶ Consequently, the court of appeals ordered the appellant to compensate the appellee for attorney fees it incurred defending the appeal.

2. *Trial Rule 65(C)*.—In *Bigley v. MSD of Wayne Township Schools*,⁹⁷ taxpayers sued a local school board, challenging the competitive bidding process it utilized to build a swimming pool.⁹⁸ The trial court granted a temporary restraining order (TRO) to the taxpayers and ordered them to post security.⁹⁹ However, a few days later, the trial court sua sponte vacated the TRO because the taxpayers’ motion failed to comply with Trial Rule 65(B)(2).¹⁰⁰ The trial court held a hearing and ultimately denied the taxpayers’ motion for preliminary injunction, dissolving the TRO. The taxpayers appealed, and the court of appeals affirmed the trial court’s decision.¹⁰¹

On remand, the school board filed a motion for the attorney fees it incurred defending the taxpayers’ preliminary injunction motion to the trial court.¹⁰² The trial court concluded that the school board was entitled to some of the attorney fees it requested, and the taxpayers appealed. After analyzing the trial court’s decision to award certain attorney fees but deny others, the court of appeals turned to the school board’s request to recover the appellate attorney fees that it incurred defending the award. The court of appeals noted that “[n]either party cites, nor does our own research reveal, any Indiana cases in which the recovery

the trial court or, if the trial court sees fit to direct the arbitrator to consider the issue, the arbitrator.

Id.

93. 891 N.E.2d 581 (Ind. Ct. App.), *trans. denied*, 898 N.E.2d 1230 (Ind. 2008).

94. *Id.* at 586 (quoting *Boczar v. Meridian St. Found.*, 749 N.E.2d 87, 95 (Ind. Ct. App. 2001)).

95. *Id.*

96. *Id.*

97. 881 N.E.2d 77 (Ind. Ct. App. 2008).

98. *Id.* at 79.

99. *Id.*

100. *Id.* at 80.

101. *Id.*

102. *Id.* at 80-81.

of attorney's fees incurred in defending an appeal of a Trial Rule 65(C) award of attorney's fees was examined."¹⁰³ However, the court noted that the rule "prohibits the trial court from issuing a restraining order or preliminary injunction 'except upon the giving of security by the applicant.'"¹⁰⁴ Additionally, Trial Rule 65(C) permits a "party who is found to have been wrongfully enjoined or restrained" to recover costs and damages it incurred.¹⁰⁵ Therefore, the *Bigley* court concluded that the school board was entitled to recover attorney fees it incurred defending the trial court's award on appeal because "[r]equiring the Board to absorb any fees or costs incurred in protecting the awarded fees would not fully compensate the Board for defending against the TRO."¹⁰⁶ As a result, the court of appeals remanded to the trial court for a hearing to determine the attorney fees the school board sustained defending the taxpayers' appeal granting the school board's attorney fees.

3. "*Additional Items As Permitted By Law*" in Appellate Rule 67.—In *Natare Corp. v. Cardinal Accounts, Inc.*,¹⁰⁷ a party that had prevailed in a previous appeal¹⁰⁸ filed a motion seeking costs for that appeal pursuant to Appellate Rule 67, which provides, in relevant part:

(B) Components. Costs shall include:

- (1) the filing fee, including any fee paid to seek transfer or review;
- (2) the cost of preparing the Record on Appeal, including the Transcript, and appendices; and
- (3) postage expenses for service of all documents filed with the Clerk.

The Court, in its discretion, may include additional items as permitted by law. Each party shall bear the cost of preparing its own briefs.

(C) Party Entitled to Costs When a judgment has been reversed in whole, the appellant shall recover costs in the Court on Appeal and in the trial court or Administrative agency as provided by law. . . .¹⁰⁹

The party that lost the previous appeal did not challenge the award of costs such as the filing fee, transcript preparation, appendix production, or postage, so the court of appeals granted the prevailing party's motion regarding those fees.¹¹⁰ However, the prevailing party also observed that Appellate Rule 67 grants the

103. *Id.* at 84.

104. *Id.* at 85 (quoting IND. TRIAL R. 65(C)).

105. IND. TRIAL R. 65(C).

106. *Bigley*, 881 N.E.2d at 86.

107. 878 N.E.2d 1290 (Ind. Ct. App. 2008).

108. *See Natare Corp. v. Cardinal Accounts, Inc.*, 874 N.E.2d 1055 (Ind. Ct. App. 2007).

109. IND. APP. R. 67(B)-(C).

110. *Natare*, 878 N.E.2d at 1292.

court of appeals discretion to award “additional items as permitted by law.”¹¹¹ Therefore, the prevailing party moved for appellate attorney fees for the previous appeal.¹¹² The *Natare* court noted that a previous panel had held that “‘additional items as permitted by law’ does include attorney fees ‘when an appeal is permeated with meritlessness, bad faith, frivolity, harassment, vexatiousness, or purpose of delay.’”¹¹³ The court noted that “[i]t is well established that in pursuing a lawsuit, attorneys are expected to ‘determine expeditiously’ the propriety of continuing the litigation and are expected to dismiss promptly claims that are found to be frivolous, unreasonable, or groundless.”¹¹⁴ If a party litigates a case past that point, “the litigation becomes frivolous and attorney fees for the other party ‘from that point in the litigation at which pursuing the claim became frivolous’ are warranted.”¹¹⁵ After analyzing the case’s timeline of events, the court of appeals concluded that the prevailing party had been “forced to appeal the erroneous result of the frivolous litigation and should not have to bear the financial burden of its attorneys’ services during the appellate process.”¹¹⁶ Consequently, the court of appeals awarded the prevailing party its appellate attorney fees pursuant to the “additional items as permitted by law” language of Appellate Rule 67.

D. Applying Appellate Rules to Arguments in Reply Briefs

Generally, new arguments made in a reply brief are waived pursuant to Appellate Rule 46(C), which provides that “[n]o new issues shall be raised in the reply brief.”¹¹⁷ In *Burns-Kish Funeral Homes, Inc. v. Kish Funeral Homes, LLC*,¹¹⁸ the court of appeals noted that although there are four requirements for obtaining a preliminary injunction, the appellant had only discussed two of them in its opening brief.¹¹⁹ Consequently, although it elaborated on all four requirements in its reply brief, the court of appeals declined to address the new arguments raised on reply and only responded to the appellant’s “two main arguments.”¹²⁰

At least two cases issued by the court of appeals suggest that a party cannot waive an argument regarding the applicable standard of review. In *Town of*

111. IND. APP. R. 67(B).

112. *Natare*, 878 N.E.2d at 1292.

113. *Id.* (quoting *Commercial Coin Laundry Sys. v. Enneking*, 766 N.E.2d 433, 442 (Ind. Ct. App. 2002)).

114. *Id.* (quoting *Kahn v. Cundiff*, 543 N.E.2d 627, 629 (Ind. 1989)).

115. *Id.* (quoting *Kahn*, 543 N.E.2d at 629).

116. *Id.* at 1292-93.

117. IND. APP. R. 46(C); *see also* *Hardley v. State*, 893 N.E.2d 1140, 1145 n.5 (Ind. Ct. App. 2008), *aff’d*, 905 N.E.2d 399 (Ind. 2009); *Cain v. Back*, 889 N.E.2d 1253, 1259 n.6 (Ind. Ct. App.), *trans. denied*, 898 N.E.2d 1230 (Ind. 2008).

118. 889 N.E.2d 15 (Ind. Ct. App. 2008).

119. *Id.* at 22.

120. *Id.* (citing IND. APP. R. 46(C)).

Chandler v. Indiana-American Water Co.,¹²¹ the appellant provided a standard of review in its opening brief but advocated for a more favorable standard of review in its reply brief. The appellee filed a motion to strike the new standard of review argument from the appellant's reply brief.¹²² Initially, the court of appeals observed that Appellate Rule 46(C) provides that no new "issues" can be raised on reply and that the appellant was simply presenting a "new argument" but "the *issue* of standard of review was presented to this court . . . in appellant's [opening] brief."¹²³ Of note is the court's holding that

the issue of the standard of review is always before us as an appellate court in every case. The parties need not present the standard of review as an issue before we may address it. To apply Appellate Rule 46(C) in the manner which [the appellee] urges would mean that this court could not apply the appropriate standard of review if a party misstated the standard of review in its briefs. The parties may choose their arguments, but they do not choose the standard of review applicable to their case.¹²⁴

Additionally, in *Kendall v. State*,¹²⁵ the court of appeals noted that the defendant had not cited the standard of review for his argument regarding the ineffectiveness of counsel and that "strict reading of our appellate rules would render this standard waived and the more deferential standard . . . would apply."¹²⁶ However, the court of appeals ultimately addressed the defendant's argument "under the most defendant friendly standard used by our Supreme Court."¹²⁷

E. A Motion to Reconsider Does Not Extend Notice of Appeal Deadline

In *Fry v. State*,¹²⁸ a criminal defendant filed a civil action against the Department of Correction (DOC) and, after Fry disregarded the discovery rules, the trial court granted the DOC's motion for judgment by default. Fry filed a motion for the trial court to reconsider its judgment, which the trial court later denied. Fry subsequently appealed.¹²⁹

The court of appeals agreed with the State's assertion that the trial court's order could be construed as an interlocutory order and not a final judgment

121. 892 N.E.2d 1264 (Ind. Ct. App. 2008).

122. *Id.* at 1267-68.

123. *Id.*

124. *Id.* at 1268 (citing *Dominiack Mech., Inc. v. Dunbar*, 757 N.E.2d 186, 188 n.1 (Ind. Ct. App. 2001)) ("[A]ppellee's failure to challenge issue upon appeal does not relieve [the court] of [its] obligation to correctly apply the law to the facts in the record.").

125. 886 N.E.2d 48 (Ind. Ct. App.), *trans. denied*, 898 N.E.2d 1219 (Ind. 2008).

126. *Id.* at 53 n.3 (quoting IND. APP. R. 46(A)(8)(b)).

127. *Id.*

128. 893 N.E.2d 1089 (Ind. Ct. App. 2008), *decision clarified on reh'g*, 901 N.E.2d 83 (Ind. Ct. App. 2009).

129. *Id.* at 1090-91.

disposing of all claims.¹³⁰ Even assuming that the trial court's judgment was a final appealable order, the court of appeals noted that Trial Rule 53.4 "provides that a motion to reconsider does not 'delay the trial or any proceedings in the case, or extend the time for any further required or permitted action, motion, or proceedings under these rules.'"¹³¹ Additionally, the court observed that "it has long been held that the time for appeal is not extended by motions to reconsider."¹³² Thus, although Appellate Rule 9 "provides that appeals from final judgments must be filed within thirty days after the entry . . . the motion to reconsider is not the same as a motion to correct error and does not work to extend the time period for filing the notice of appeal."¹³³ Consequently, because Fry did not file his notice of appeal within thirty days of the final judgment and the motion to reconsider did not extend the deadline, the court of appeals dismissed the action as untimely without addressing the merits of Fry's appeal.¹³⁴

*F. Appellant Cannot Seek Rehearing from Denial of Motion to
Accept Interlocutory Appeal*

In *Merck & Co. v. Kantner*,¹³⁵ the motions panel of the court of appeals issued a published order denying a party's motion for the panel to reconsider the denial of a motion to accept an interlocutory appeal.¹³⁶ Appellate Rule 54(A) provides that "[a] party may seek Rehearing from the following: (1) a published opinion; (2) a not-for-publication memorandum decision; (3) an order dismissing an appeal; and (4) an order declining to authorize the filing of a successive petition for post-conviction relief."¹³⁷ The motions panel noted that

[t]he denial of a Petition for Acceptance Of Interlocutory Appeal under Indiana Appellate Rule 14(B) is not an opinion, published or otherwise, or an order declining to authorize the filing of a successive petition for post-conviction relief. Furthermore, the denial of a request to accept a discretionary interlocutory appeal is not a dismissal, rather it is a decision that does not allow an appeal to begin. Because it is not one of the rulings that Indiana Appellate Rule 54 allows to be reheard by this Court, a Petition for Rehearing cannot be taken from the denial of a request to accept a discretionary interlocutory appeal under Indiana Appellate Rule 14(B).¹³⁸

Senior Judge George B. Hoffman, Jr. dissented from the motion panel's

130. *Id.* at 1091.

131. *Id.* at 1091-92 (citing IND. TRIAL R. 53.4(A)).

132. *Id.* at 1092 (citing *Strate v. Strate*, 269 N.E.2d 568, 569 (Ind. Ct. App. 1971)).

133. *Id.*

134. *Id.*

135. 883 N.E.2d 846 (Ind. Ct. App. 2008).

136. *Id.*

137. IND. APP. R. 54(A).

138. *Merck*, 883 N.E.2d at 846.

decision, arguing that Trial Rule 14(B) “clearly states that the only prerequisite for this Court to accept a discretionary interlocutory appeal is certification of the order by the trial court.”¹³⁹ In support of his position, Judge Hoffman cited *Bridgestone Americas Holding Inc. v. Mayberry* (*Bridgestone I*), a case in which the court of appeals’s motions panel initially denied the appellant’s petition to accept jurisdiction but subsequently reconsidered its decision and accepted jurisdiction after the appellant filed a motion to reconsider.¹⁴⁰ The *Bridgestone I* court noted that Appellate Rule 54(A)(3) “permit[s] a petition for rehearing from ‘an order dismissing an appeal’”¹⁴¹ and

[h]ere, the first motions panel’s refusal to accept jurisdiction of Bridgestone’s discretionary interlocutory appeal is the functional equivalent of an order dismissing an appeal. That is, our refusal to accept jurisdiction has the same practical effect on litigants as an order dismissing an appeal. Thus, because Bridgestone petitioned for rehearing within 30 days of the first motions panel’s order, and there is no evidence that the trial court had . . . reassumed jurisdiction, the second motions panel was not precluded from reconsidering and accepting jurisdiction of Bridgestone’s interlocutory appeal.¹⁴²

Although the supreme court granted transfer on *Bridgestone I*, it explicitly “summarily affirm[ed] the Court of Appeals’ treatment” of the motion to reconsider the denial of the motion to accept the interlocutory appeal.¹⁴³ Therefore, in *Merck*, Judge Hoffman concluded that “[a]s our supreme court noted, the reasoning set forth in [*Bridgestone I*] is persuasive. I believe that we have jurisdiction to reconsider a motions panel’s decision.”¹⁴⁴

Merck sought transfer to the supreme court after the court of appeals denied rehearing. On June 5, 2008, the supreme court issued an order concluding that *Merck*’s petition to transfer was improper¹⁴⁵ because Appellate Rule 57(B) expressly provides that “an order denying a motion for [a discretionary] interlocutory appeal . . . shall not be considered an adverse decision for the purpose of petitioning to transfer, regardless of whether rehearing by the Court of Appeals was sought.”¹⁴⁶ Accordingly, the supreme court concluded *Merck*’s

139. *Id.* at 847 (Hoffman, J., dissenting) (quoting *Bridgestone Ams. Holding, Inc. v. Mayberry*, 854 N.E.2d 355, 359 (Ind. Ct. App. 2006) (*Bridgestone I*), *vacated on other grounds but issue summarily affirmed* by *Bridgestone Ams. Holding, Inc. v. Mayberry*, 878 N.E.2d 189 (Ind. 2007) (*Bridgestone II*)).

140. *Bridgestone I*, 584 N.E.2d at 358.

141. *Id.* at 360 (quoting IND. APP. R. 54(A)(3)).

142. *Id.*

143. *Bridgestone II*, 878 N.E.2d at 191 n.2.

144. *Merck*, 883 N.E.2d at 847.

145. See Indiana Clerk of Courts Docket, <http://hats.courts.state.in.us/ISC3RUS/ISC2menu.jsp> (Cause No. 49A04-0712-CV-00706) (last visited June 14, 2009). Justice Frank Sullivan, Jr. voted to remand the case to the court of appeals for consideration of the rehearing petition. *Id.*

146. IND. APP. R. 57(B)(4).

petition to transfer was “procedurally improper” and ordered the petition and response to be returned to the parties.¹⁴⁷

G. Judicial Notice of Independent Electronic Research

The ease with which judges can conduct independent electronic research has led to the question of whether courts should be allowed to do so. Before turning to recent developments in this area, some background information is necessary. Indiana Evidence Rule 201(a) provides:

A court may take judicial notice of a fact. A judicially-noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court, or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.¹⁴⁸

Additionally, the commentary to Canon 3B of the 2008 Indiana Code of Judicial Conduct¹⁴⁹ advised that “[a] judge must not independently investigate facts in a case and must consider only the evidence presented.”¹⁵⁰ These provisions have been construed as authorizing judicial notice of matters of common knowledge and matters that may not be common knowledge¹⁵¹ but are easily verified by unquestionably reliable sources.¹⁵² Additionally, the *Indiana Practice* treatise lists examples where courts have taken judicial notice of “verifiable facts,” including geography, “the whereabouts of Indiana counties,” the “distances between cities, . . . standard mortality tables,” and election results.¹⁵³

In *Fisher v. State*,¹⁵⁴ the court of appeals resolved as an issue of first impression whether an appellate court could take judicial notice in a post-conviction relief case of a record from the defendant’s direct criminal appeal even though the trial court had affirmatively declined the opportunity to examine the record from the direct appeal. The court of appeals relied on Evidence Rule

147. *Id.*

148. IND. EVID. R. 201(a).

149. The 2008 Code of Judicial Conduct has been superseded by the 2009 version. *See infra* notes 162-65 and accompanying text.

150. *A.B. v. State*, 885 N.E.2d 1223, 1224 (Ind. 2008).

151. *See, e.g.*, *Journal-Gazette Co., Inc. v. Bandido’s, Inc.*, 712 N.E.2d 446, 460 n.20 (Ind. 1999) (taking judicial notice of the fact that the words “rats” and “rodents” are frequently used interchangeably); *Haley v. State*, 736 N.E.2d 1250, 1253 (Ind. Ct. App. 2000) (affirming the trial court’s decision to take judicial notice that a local institution was a school).

152. *See, e.g.*, *Wright v. Spinks*, 722 N.E.2d 1278, 1279 (Ind. Ct. App. 2000) (affirming the trial court’s decision to take judicial notice of the word “mulligan” because it is defined in a dictionary and cases from other jurisdictions); *Griffin v. Acker*, 659 N.E.2d 659, 663 (Ind. Ct. App. 1995) (concluding that it would have been proper for the trial court to take judicial notice of interest tables to determine present value of a damage award).

153. 12 ROBERT L. MILLER, INDIANA PRACTICE § 201.104 (2007).

154. 878 N.E.2d 457 (Ind. Ct. App. 2007), *trans. denied*, 891 N.E.2d 41 (Ind. 2008).

201 and concluded that “based on the facts of this case, we may examine the record from Fisher’s direct appeal to the extent it contains factual information not subject to reasonable dispute.”¹⁵⁵ The *Fisher* court also made interesting observations regarding new technology and its potential effect on judicial notice:

We take this opportunity to note that on December 17, 2007, Odyssey, a new computerized case management system, was implemented in Monroe county, pursuant to a project of our Supreme Court’s Judicial Technology Automation Committee (“JTAC”). This system will allow courts to exchange and share information with other courts and state agencies, pursuant to JTAC’s belief that “it is in the best interest of Indiana’s citizens, trial courts, court clerks, law enforcement officials, and lawyers that all of Indiana’s courts maintain their records in a statewide computerized case management system that connects courts across county lines and connects courts with local and state entities that need court information.” *The implementation of this project demonstrates the growing trend of allowing trial courts to access and consider reliable information stored in court or other government records. We speculate that along with this access will undoubtedly come more permissive use of judicial notice, as it would be fairly unproductive to allow courts to access this information but not consider it.*

We also note that in 2000, our supreme court adopted family court rules for temporary use by trial courts participating in the Indiana Supreme Court Family Court Project. Pursuant to these rules, a family court “may take judicial notice of any relevant orders or Chronological Case Summary (CCS) entry issued by any Indiana Circuit, Superior, County, or Probate Court.” Additionally, parties to a family court proceeding are permitted access to all cases within the proceeding, except that in the case of confidential records in a case to which they are not a party, parties must file a written petition identifying relevancy and need. *These rules also demonstrate the increasing liberal allowance of judicial notice and use of court records in related proceedings.*¹⁵⁶

In *A.B. v. State*,¹⁵⁷ the supreme court was presented with an issue of first impression regarding the propriety of criminal charges brought against a juvenile who posted “a vulgar tirade” about her school principal on the Internet site MySpace.com.¹⁵⁸ As a preliminary matter, the supreme court noted that “the evidence presented at the fact-finding hearing was extremely sparse, uncertain, and equivocal regarding the operation and use of [MySpace], which is central to this case.”¹⁵⁹ After citing to the commentary of Canon 3B of the 2008 Indiana

155. *Id.* at 462.

156. *Id.* at 462 n.2 (emphases added) (citations omitted).

157. 885 N.E.2d 1223 (Ind. 2008).

158. *Id.* at 1225.

159. *Id.* at 1224.

Code of Judicial Conduct,¹⁶⁰ the supreme court stated: “Notwithstanding this directive, in order to facilitate understanding of the facts and application of relevant legal principles, this opinion includes information regarding the operation and use of MySpace from identified sources outside the trial record of this case.”¹⁶¹ The court subsequently explained how MySpace worked, citing various protocols and articles written about the site.

On September 9, 2008, the supreme court issued a press release regarding the adoption of a new Code of Judicial Conduct, effective January 1, 2009.¹⁶² The 2009 Code of Judicial Conduct is modeled after the 2007 American Bar Association Model Code of Judicial Conduct.¹⁶³ Rule 2.9(C) of the newly-adopted code provides that “[a] judge shall not investigate facts in a matter independently, and shall consider only the evidence presented and any facts that may properly be judicially noticed.”¹⁶⁴ Although this language is similar to the language from Canon 3B of the 2008 Indiana Code of Judicial Conduct, the commentary in the newly-adopted code explicitly provides that “[t]he prohibition against a judge investigating the facts in a matter extends to information available in all mediums, including electronic.”¹⁶⁵ It certainly will be interesting to monitor how courts reconcile the accessibility of independent electronic research with the new judicial notice provisions in future decisions.

III. TIPS FOR APPELLATE PRACTITIONERS

A. *Failure to Comply with Appellate Rules May Result in Dismissal*

In *Galvan v. State*,¹⁶⁶ the court of appeals dismissed a criminal defendant’s appeal “[d]ue to flagrant violations of the appellate rules.”¹⁶⁷ The court noted that although it had previously warned Galvan’s attorney “on at least three occasions regarding his inadequate appellate advocacy . . . [he] has inexplicably chosen to ignore our advice.”¹⁶⁸ Specifically, the court of appeals noted that the statement of facts did not comply with Appellate Rule 46(A)(6); the statement of the case did not comply with Appellate Rule 46(A)(5); the brief did not include a copy of the sentencing order as required by Appellate Rule 46(A)(10); the summary of the argument section merely copied the argument heading in violation of Appellate Rule 46(A)(7); the “paltry table of contents provided in the appendix has further hampered our review” in violation of Appellate Rule 50(C);

160. *See supra* note 149 and accompanying text.

161. *A.B.*, 885 N.E.2d at 1224.

162. Press Release, Indiana Supreme Court, Indiana Supreme Court Adopts 2009 Judicial Code of Conduct (Sept. 8, 2008), *available at* <http://www.in.gov/judiciary/press/2008/0908.html>.

163. *Id.*

164. IND. CODE OF JUDICIAL CONDUCT Rule 2.9(C) (2009).

165. *Id.* cmt. 6.

166. 877 N.E.2d 213 (Ind. Ct. App. 2007).

167. *Id.* at 215.

168. *Id.*

and the argument section was not supported by cogent reasoning as required by Appellate Rule 46(A)(8)(a).¹⁶⁹ “In light of the numerous and flagrant violations of [the] appellate rules,” the court of appeals concluded that it “must dismiss [the] appeal.”¹⁷⁰

While the court of appeals had previously rejected appeals for noncompliance with the Appellate Rules,¹⁷¹ the *Galvan* court took it further and ordered that Galvan’s attorney was “not entitled to a fee for his appellate services in this case, and we direct him to return to the payor any fee he may have already received.”¹⁷² The court also cautioned Galvan’s attorney that “future violations such as this may result in additional consequences, such as referral to the Supreme Court Disciplinary Commission for investigation, as Indiana Professional Conduct Rule 1.1 requires attorneys to represent their clients competently.”¹⁷³

Of note is that the *Galvan* court chose to take away counsel’s attorney fees before invoking the other consequences it had described in *Keeney v. State*.¹⁷⁴ In *Keeney*, the court of appeals admonished counsel for a brief that contained a gross amount of uncited material in violation of Appellate Rule 46(A)(8)(a).¹⁷⁵ Although the *Keeney* court chose to admonish counsel without further consequence, it noted that it could have taken away counsel’s attorney fees, stricken the brief entirely, ordered counsel “to show cause . . . [as to] why she should not be held in contempt,” and referred the matter to the Supreme Court Disciplinary Commission for investigation.¹⁷⁶

B. Check the Online Docket

During the reporting term, the court of appeals reminded counsel that the Clerk of Courts maintains an online docket for counsel to monitor their appellate cases.¹⁷⁷ A link to the online docket is available at <http://www.in.gov/judiciary/cofc/>. The court of appeals noted that counsel can use the online docket to

169. *Id.* at 215-16.

170. *Id.* at 216.

171. *See, e.g., Ramsey v. Review Bd. of Ind. Dep’t of Workforce Dev.*, 789 N.E.2d 486, 490 (Ind. Ct. App. 2003); *Smith v. State*, 610 N.E.2d 265, 267 n.2 (Ind. Ct. App. 1993).

172. *Galvan*, 877 N.E.2d at 217.

173. *Id.*

174. 873 N.E.2d 187 (Ind. Ct. App. 2007). *Keeney* was profiled in last year’s appellate procedure survey. Bryan H. Babb & Stephen A. Starks, *Developments in Indiana Appellate Procedure: Appellate Rule Amendments, Remarkable Case Law, and Refining Our Indiana Practice*, 41 IND. L. REV. 853, 877-79 (2008).

175. *Keeney*, 873 N.E.2d at 189.

176. *Id.* at 190.

177. *See, e.g., Hieston v. State*, 885 N.E.2d 59, 59 n.1 (Ind. Ct. App.), *trans. denied*, 898 N.E.2d 1226 (Ind. 2008); *Williams v. State*, 883 N.E.2d 192, 192 n.1 (Ind. Ct. App. 2008). The online appellate docket first became available in October 2001. Douglas E. Cressler, *Appellate Practice: A Year of Transition in Appellate Practice*, 35 IND. L. REV. 1133, 1154 (2002).

monitor filings in cases and confirm that a case, once fully briefed, has been transmitted from the clerk's office to the court.¹⁷⁸

C. Know When to Cite

Pursuant to Appellate Rule 65(D), unpublished memorandum decisions “shall not be cited to any court except by the parties to the case to establish res judicata, collateral estoppel, or law of the case.”¹⁷⁹ The court of appeals had various opportunities to direct counsel to Appellate Rule 65 to remind them not to cite unpublished decisions.¹⁸⁰ Additionally, in *Jackson v. State*,¹⁸¹ the court noted that counsel had cited an unpublished decision contrary to Appellate Rule 65(D) and cautioned that “[a]lthough our memorandum decisions are now available online at <http://www.in.gov/judiciary/opinions/>, and have recently become available through commercial providers such as Westlaw, they are still unpublished memorandum decisions. Practitioners cannot assume that a decision from this court found online or in a commercial database is citable as precedent.”¹⁸²

In other decisions, the court of appeals reminded counsel that they risk having their arguments deemed waived if they do not cite to authority,¹⁸³ or the record,¹⁸⁴ as required by Appellate Rule 46(A)(8). Additionally, “[w]hen referring to specific material within a source, a citation should include both the page on which the source begins and the page on which the specific material appears” pursuant to Appellate Rule 22.¹⁸⁵ In other words, when drafting appellate briefs, counsel should be mindful to appropriately cite authority to ease the appellate court's consideration of the issues or risk having the argument deemed waived.

D. Include Copy of Appealed Order with Notice of Appeal and Brief of Appellant

In *Newman v. Jewish Community Center Ass'n of Indianapolis*,¹⁸⁶ the appellant did not attach a copy of the trial court's order she was appealing to her notice of appeal, as required by Appellate Rule 9(F)(1).¹⁸⁷ The appellees argued

178. See *Hieston*, 885 N.E.2d at 59 n.1; *Williams*, 883 N.E.2d at 192 n.1

179. IND. APP. R. 65(D).

180. See, e.g., *In re Paternity of C.H.W.*, 892 N.E.2d 166, 173 n.2 (Ind. Ct. App.), *trans. denied*, 898 N.E.2d 1229 (Ind. 2008); *Weidman v. State*, 890 N.E.2d 28, 31 n.1 (Ind. Ct. App. 2008).

181. 890 N.E.2d 11 (Ind. Ct. App. 2008).

182. *Id.* at 21 n.4.

183. *Midwest Biohazards Servs., LLC v. Rodgers*, 893 N.E.2d 1074, 1078 n.2 (Ind. Ct. App. 2008), *trans. denied*, No. 41A05-CV-290, 2009 Ind. LEXIS 178, at *1 (Ind. Feb. 26, 2009).

184. *Davis v. State*, 892 N.E.2d 156, 163 (Ind. Ct. App. 2008).

185. *Webb v. Schleutker*, 891 N.E.2d 1144, 1155 n.7 (Ind. Ct. App. 2008).

186. 875 N.E.2d 729 (Ind. Ct. App. 2007), *trans. denied*, 891 N.E.2d 42 (Ind. 2008).

187. *Id.* at 734.

that, consequently, she had waived her arguments. The court of appeals noted that the appellees

do not direct us to case precedent holding that such error is fatal to an appellant's claim. . . . Because of our penchant for addressing an appellant's claims on the merits, we decline to find that [appellant] has waived this issue on appeal and, instead, turn to the merits of her claim.¹⁸⁸

Appellate Rule 46(A) requires an appellant to include a copy of the appealed order with the appellant's brief.¹⁸⁹ Additionally, the court of appeals observed that a party's "attempt to incorporate the trial court's findings of fact and conclusions into her brief 'by reference'" instead of attaching the trial court's order "is not sufficient" to satisfy Appellate Rule 46(A).¹⁹⁰

E. Adequate Briefing

The supreme court and court of appeals cited Appellate Rule 46(A)(8) countless times for the premise that a party's failure to make a cogent argument results in waiver of the argument.¹⁹¹ The court of appeals also cited Appellate Rule 46 to warn parties who inadequately drafted the statement of facts¹⁹² and the statement of case¹⁹³ sections of their brief. Although Appellate Rule 46(B)(1) "permits the appellee to omit the statement of issues, statement of the case, and the statement of facts if the appellee agrees with those statements as expressed in the appellant's brief," the court of appeals emphasized that the rule "requires the appellee to *expressly state its agreement* with appellant's statement."¹⁹⁴ Additionally, all text in all briefs should be double spaced, except for "lengthy

188. *Id.*

189. *Allen v. State*, 893 N.E.2d 1092, 1095 n.3 (Ind. Ct. App. 2008), *trans. denied*, No. 49A04-0710-CR-598, 2009 Ind. LEXIS 137, at *1 (Ind. Feb. 19, 2009); *In re* Petition for the Establishment of the Millpond Conservancy Dist., 891 N.E.2d 54, 55 n.1 (Ind. Ct. App. 2008).

190. *Gleeson v. Preferred Sourcing, LLC*, 883 N.E.2d 164, 171 n.5 (Ind. Ct. App. 2008). Nevertheless, the *Gleeson* court addressed the merits of the case. *Id.* at 171.

191. *See, e.g., Overstreet v. State*, 877 N.E.2d 144, 153 n.4 (Ind. 2007), *cert. denied*, 129 S. Ct. 458 (2008); *Triplett v. USX Corp.*, 893 N.E.2d 1107, 1117 (Ind. Ct. App. 2008), *trans. denied*, No. 93A02-0803-EX-300, 2009 Ind. LEXIS 87, at *1 (Ind. Jan. 29, 2009); *Engram v. State*, 893 N.E.2d 744, 747 (Ind. Ct. App. 2008), *trans. denied*; *Patel v. United Inns, Inc.*, 887 N.E.2d 139, 149 n.6 (Ind. Ct. App.), *reh'g denied*, 897 N.E.2d 945 (Ind. Ct. App. 2008).

192. *Wolljung v. Sidell*, 891 N.E.2d 1109, 1110 n.1 (Ind. Ct. App. 2008) (cautioning party that Appellate Rule 46(A)(6) requires a brief to include a statement of facts).

193. *Progressive Halcyon Ins. Co. v. Petty*, 883 N.E.2d 854, 855 n.1 (Ind. Ct. App.) (reminding party that statement of case must contain citations to the record pursuant to IND. APP. R. 46(A)(5)), *trans. denied*, 898 N.E.2d 1217 (Ind. 2008).

194. *J.R.W. ex rel. Jemerson v. Watterson*, 877 N.E.2d 487, 488 n.1 (Ind. Ct. App. 2007) (emphasis added).

quotes and footnotes.”¹⁹⁵ One panel expressly cited *Galvan*¹⁹⁶ for the premise that not complying with the Appellate Rules can lead to dismissal of the appeal.¹⁹⁷ Appellate practitioners should make sure they comply with the Appellate Rules when drafting their briefs so that they do not waive arguments or risk having their appeal dismissed.

F. Transcripts

When ordering a transcript for the record on appeal, it is better to include more rather than less. In *Titone v. State*,¹⁹⁸ the court of appeals dismissed an appeal because the appellant did not include a complete copy of the transcript.¹⁹⁹ Pursuant to Appellate Rule 9(F)(4), the general rule is that a transcript of all the evidence must be requested in criminal cases, unless the appeal is limited to an issue that does not require a transcript.²⁰⁰ However, “[s]ufficiency of the evidence is simply not one of those issues where the transcript of all the evidence cannot be requested.”²⁰¹ The *Titone* court concluded:

As such, we hold that when a defendant challenges the sufficiency of the evidence, the defendant must request the transcript of all the evidence in the Notice of Appeal. And despite [the defendant’s] suggestion on appeal, the State does not have an obligation to present the rest of the evidence. It is true that Appellate Rule 9(G) provides a mechanism whereby any party to an appeal may file a request for additional portions of the transcript. However, Appellate Rule 9(G) speaks in terms of “may,” while Appellate Rule 9(F)(4) speaks in terms of “must.” [The defendant] has not met his obligation of presenting a sufficient record for us to fairly decide his sufficiency of the evidence challenge[; thus], we dismiss his appeal.²⁰²

In *Center Townhouse Corp. v. City of Mishawaka*,²⁰³ the appellant included a limited portion of the transcript from the jury trial on damages but did not

195. *Decker v. Zengler*, 883 N.E.2d 839, 840 n.1 (Ind. Ct. App.) (citing IND. APP. R. 43(E)), *trans. denied*, 898 N.E.2d 1224 (Ind. 2008).

196. *Galvan v. State*, 877 N.E.2d 213, 216 (Ind. Ct. App. 2007); *see also supra* notes 166-76 and accompanying text.

197. *Wolljung*, 891 N.E.2d at 1110 n.1.

198. 882 N.E.2d 219 (Ind. Ct. App. 2008).

199. *Id.* at 222-23.

200. *Id.* at 222. This is not true in the civil context. As the court of appeals noted in *Fields v. Conforti*—a case profiled in last year’s appellate procedure article—although “appellants did not submit a transcript of the bench trial [on] which the trial court’s findings . . . and conclusions . . . were based,” the court held that it would “‘attempt’ to address the appellants’ arguments.” *Titone*, 882 N.E.2d at 222 n.4 (citing *Fields v. Conforti*, 868 N.E.2d 507, 511 (Ind. Ct. App. 2007)).

201. *Titone*, 882 N.E.2d at 222.

202. *Id.* at 222-23.

203. 882 N.E.2d 762 (Ind. Ct. App.), *trans. denied*, 898 N.E.2d 1218 (Ind. 2008).

include the transcript from the bench trial where “the trial court determined a taking had occurred.”²⁰⁴ Because the court of appeals “[did] not know what evidence was presented on the taking[s] claim, nor whether it supports the trial court’s findings[,]” the court held that the appellant had waived its argument that there had not been a taking.²⁰⁵

While the court of appeals typically considers an argument waived if the applicable transcripts are not included in the record on appeal, the *Bailey v. State Farm Mutual Auto Insurance Co.*²⁰⁶ panel cited its penchant for addressing cases on the merits, despite its recognition of the “incomplete nature of the record.”²⁰⁷ Therefore, the court went on to address the appellant’s arguments “as best we can through our examination of the portion of the trial record provided.”²⁰⁸

In *Baxter v. State*,²⁰⁹ the court of appeals noted “some deficiencies with the transcript and volume of exhibits that were filed with this court.”²¹⁰ The transcript did not contain a separately-bound table of contents as required by Appellate Rule 28(A)(8) or a “cover page as required by Appellate Rule 28(A)(7) and Appellate Form 28-1.”²¹¹ However, what the court found

[m]ost problematic . . . is the state of the exhibits volume, which does not appear to be in any discernible order and which lacks an overall index of exhibits, as required by Appellate Rule 29(A). This has made it difficult to find highly relevant exhibits. It is unclear whether responsibility for the disorderly exhibit volume rests upon the court reporter or a party who used the volume after the reporter filed it. We urge greater care in ensuring that orderly records are presented.²¹²

G. Appendix Materials

“[I]t is incumbent upon the parties to present [the court] with a complete appellate appendix.”²¹³ An appendix should include a table of contents²¹⁴ and all confidential documents should be printed on green paper pursuant to Appellate

204. *Id.* at 769.

205. *Id.* at 769-70 (citing IND. APP. R. 9(F)(4)).

206. 881 N.E.2d 996 (Ind. Ct. App. 2008).

207. *Id.* at 999 n.1.

208. *Id.*

209. 891 N.E.2d 110 (Ind. Ct. App. 2008).

210. *Id.* at 113 n.2.

211. *Id.*

212. *Id.*

213. *Kovach v. Alparma, Inc.*, 890 N.E.2d 55, 65 (Ind. Ct. App. 2008) (noting that the appellant’s appendix fell “woefully short” and that the appellees had “omitted to rectify this oversight”), *trans. granted*, No. 49S04-0902-CV-88, 2009 Ind. LEXIS 160, at *1 (Ind. Feb. 27, 2009).

214. *Adams v. State*, 890 N.E.2d 770, 771 n.4 (Ind. Ct. App. 2008) (citing Appellate Rule 50(C)), *trans. denied*, 901 N.E.2d 1094 (Ind. 2009).

Rule 9(J).²¹⁵ Additionally, pursuant to Appellate Rule 50(A)(2)(f), it “is inappropriate for an appellant to include only its own documents in the appendix; instead, it must include *all* relevant documents, including those filed by the opposing party.”²¹⁶ That said, parties should not include unnecessary materials in an appendix. For example, when a transcript is included in the record on appeal, it is unnecessary to include lengthy portions of the transcript in the appendix:

In cases like this, with numerous issues and a multivolume transcript, it is far more helpful (not to mention far more economical) for all parties to cite to the transcript and not to include large portions of the transcript in their appendices. . . . As a final consideration, it is also helpful for each volume of a multi-volume appendix to have a table of contents for the entire appendix.²¹⁷

“The appellate rules do not permit material to be included in a party’s appendix that was not presented to the trial court.”²¹⁸ Although an appellant included several motions and trial court orders in its appendix that had been filed before the appellee had become involved in the litigation at the trial court level, the court of appeals noted that “our appellate rules instruct a party to include, among other things, ‘pleadings and other documents from the Clerk’s Record in chronological order that are necessary for the resolution of the issues raised on appeal[.]’”²¹⁹ As a result, the court found it “difficult to fault [the appellant] for including such motions and orders.”²²⁰

In *American Family Mutual Insurance Co. v. Matusiak*,²²¹ the appellee asked the court of appeals to dismiss an appeal and impose sanctions on the appellant because the appellant’s appendix allegedly misrepresented the facts and required the appellees to expend an “unwarranted amount of time” to provide a “proper record.”²²² Although the court of appeals acknowledged Appellate Rule 50 and found that the appellant had failed to comply with the provision, it declined to dismiss the appeal or impose appellate sanctions. Interestingly, the court advised

215. See, e.g., *Ramon v. State*, 888 N.E.2d 244, 249 n.7 (Ind. Ct. App. 2008); *Forgey v. State*, 886 N.E.2d 16, 22 n.15 (Ind. Ct. App. 2008); *Gale v. State*, 882 N.E.2d 808, 812 n.3 (Ind. Ct. App. 2008).

216. *Plaza Group Props., LLC v. Spencer County Plan Comm’n*, 877 N.E.2d 877, 880 n.2 (Ind. Ct. App. 2007), *trans. denied*, 891 N.E.2d (Ind. 2008); see also *Kopka Landau & Pinkus v. Hansen*, 874 N.E.2d 1065, 1069 n.3 (Ind. Ct. App. 2007).

217. *Dennerline v. Atterholt*, 886 N.E.2d 582, 587 n.3 (Ind. Ct. App.) (construing Appellate Rule 50(A)), *trans. dismissed*, 898 N.E.2d 1230 (Ind. 2008).

218. *Bailey v. State Farm Mut. Auto Ins.*, 881 N.E.2d 996, 999 n.1 (Ind. Ct. App. 2008) (quoting *In re Contempt of Wabash Valley Hosp., Inc.*, 827 N.E.2d 50, 57 n.6 (Ind. Ct. App. 2005)).

219. *Id.* (quoting IND. APP. R. 50(A)(2)(f)).

220. *Id.*

221. 878 N.E.2d 529 (Ind. Ct. App. 2007), *trans. denied*, 898 N.E.2d 1218 (Ind. 2008).

222. *Id.* at 533 n.5.

the appellee that “[i]nstead of requesting dismissal and sanctions, perhaps the better practice would have been to file a Motion for Conforming Appendix with this court, which almost certainly would have been granted, thereby saving [the appellees] ‘the cost of completing the work that should have been done by [the appellant].’”²²³

*H. Decorum*²²⁴

During the reporting term, the court of appeals had the opportunity to critique behavior it considered inappropriate. In *City of East Chicago v. East Chicago Second Century, Inc.*,²²⁵ the court of appeals reminded counsel that the statement of facts should be “a concise narrative of the facts stated in accordance with the standard of review appropriate to the judgment or order being appealed, and it should not be argumentative.”²²⁶ By contrast, the court of appeals observed that the appellant’s statement of facts was “a transparent attempt to discredit both the judgment and the opponents’ character, and was plainly not intended to be a vehicle for informing this court.”²²⁷ Additionally, the court noted that throughout its brief, the appellant had characterized its opponent’s arguments as “bait and switch,” a “transparent effort at legal ‘sleight of hand,’” a “slick device,” “specious,” “a scattershot of undeveloped arguments,” an “incredible position,” “fiction,” “ludicrous,” and “silly.”²²⁸ Although the court of appeals ultimately addressed the appellant’s arguments on their merits, it reaffirmed statements from a prior case in which it chastised inappropriate conduct:

Throughout the parties’ briefs, they have launched rhetorical broadsides at each other which have nothing to do with the issues in this appeal. Counsels’ comments concern their opposite numbers’ intellectual skills, motivations, and supposed violations of the rules of common courtesy. Because similar irrelevant discourse is appearing with ever-increasing frequency in appellate briefs, we find it necessary to discuss the easily-answered question of whether haranguing condemnations of opposing counsel for supposed slights and off-record conduct unrelated to the issues at hand is appropriate fare for appellate briefs.

At the outset, we point to the obvious: the judiciary, in fact and of necessity, has absolutely no interest in internecine battles over social

223. *Id.* (citations omitted).

224. The authors realize that the supreme court has granted transfer on both of the cases cited in the decorum section. However, it is their belief that comments regarding appropriate counsel behavior warrant citation.

225. 878 N.E.2d 358 (Ind. Ct. App. 2007) (citing IND. APP. R. 46(A)(6)), *trans. granted*, 898 N.E.2d 1219 (Ind. 2008).

226. *Id.* at 365 n.2.

227. *Id.*

228. *Id.* (citations omitted).

etiquette or the unprofessional personality clashes which frequently occur among opposing counsel these days. Irrelevant commentary thereon during the course of judicial proceedings does nothing but waste valuable judicial time. On appeal, it generates a voluminous number of useless briefing pages which have nothing to do with the issues presented, as in this appeal.

Further, appellate counsel should realize, such petulant grouching has a deleterious effect on the appropriate commentary in such a brief. Material of this nature is akin to static in a radio broadcast. It tends to blot out legitimate argument.

On a darker note, if such commentary in appellate briefs is actually directed to opposing counsel for the purpose of sticking hyperbolic barbs into his or her opposing numbers' psyche, the offending practitioner is clearly violating the intent and purpose of the appellate rules. In sum, we condemn the practice, and firmly request the elimination of such surplusage from future appellate briefs.²²⁹

After condemning counsel's behavior, the *City of East Chicago* court concluded that

[a] brief should not only present the issues to be decided on appeal, but it should be of material assistance to the court in deciding those issues. A brief is far more helpful to this court, and it advocates far more effectively for the client, when its focus is on the case before the court and not on counsel's opponent.²³⁰

The court of appeals commended opposing counsel "to the extent they have avoided responding in a similar tone to [the appellant's] arguments."²³¹

The court of appeals had another opportunity to criticize objectionable behavior in *Henri v. Curto*.²³² In the underlying action, Henri filed a civil suit against Curto, alleging that Curto raped her while they were students at Butler University. Although criminal charges were never filed, a Butler University "judicial official concluded that Curto had violated University rules and suspended [him] for four years."²³³ Curto filed a counterclaim against Henri, "alleging that [she] tortiously interfered with [his] contract with Butler University as a student enrolled in a degree program."²³⁴ After a trial, "the jury returned a unanimous verdict finding that Curto had not raped Henri, and that Henri tortiously interfered with Curto's contract with [the] University . . . [and]

229. *Id.* (quoting *Amax Coal Co. v. Adams*, 597 N.E.2d 350, 352 (Ind. Ct. App. 1992)).

230. *Id.* (citing *Young v. Butts*, 685 N.E.2d 147, 151 (Ind. Ct. App. 1997)).

231. *Id.*

232. 891 N.E.2d 135 (Ind. Ct. App. 2008), *rev'd*, 2009 Ind. LEXIS 489 (Ind. 2009).

233. *Id.* at 136.

234. *Id.* at 137.

award[ed] Curto \$45,000 on his counterclaim.”²³⁵

On appeal, Henri included an introduction section in her brief of appellant and “contend[ed] that Henri was raped once by Curto and then raped again by the judicial system.”²³⁶ Curto filed a motion to strike the introduction, which the court of appeals granted after noting that Appellate Rule 42 gives the court discretion to “strike from documents matter that is ‘redundant, immaterial, impertinent, scandalous’ or otherwise inappropriate.”²³⁷ The court of appeals concluded that “[t]he Introduction does not aid our consideration of the issues and is inappropriate[;]” therefore, it should be stricken.²³⁸ *City of East Chicago* and *Henri* demonstrate that the court of appeals will not tolerate inappropriate attacks on appeal.

IV. INDIANA’S APPELLATE COURTS

A. Case Data from the Supreme Court

During the 2008 fiscal year,²³⁹ the supreme court disposed of 1200 cases, issuing 168 majority opinions and published orders²⁴⁰ and 42 non-dispositive opinions.²⁴¹ The supreme court heard oral argument in 74 cases—30 criminal cases and 44 civil cases.²⁴² It decided seven capital cases—five on direct appeal and two on petitions for post-conviction relief.²⁴³ Of the supreme court’s 1200 dispositions, 657 were in criminal cases, 387 were in civil cases, 108 were attorney discipline matters, 41 were original actions, five were tax cases, one was a mandate of funds, and one was a petition for review of the State Board of Law Examiners.²⁴⁴ “[P]rior to 2006, the United States Supreme Court had not decided an appeal from the Indiana Supreme Court in approximately 25 years.”²⁴⁵ However, in the past three years, the United States Supreme Court has decided two such appeals—*Davis v. Washington*²⁴⁶ and *Indiana v. Edwards*.²⁴⁷

In the 2008 Annual Report, the supreme court observed that of its 1200

235. *Id.*

236. *Id.* at 137 n.3.

237. *Id.* (quoting IND. APP. R. 42).

238. *Id.*

239. The supreme court 2008 fiscal year ran from July 1, 2007 through June 30, 2008. See INDIANA SUPREME COURT ANNUAL REPORT 2007-08, at 2 (2008), available at <http://www.in.gov/judiciary/supremeadmin/docs/0708report.pdf> [hereinafter 2008 ANNUAL REPORT].

240. *Id.* at 43-44.

241. *Id.* at 44 (non-dispositive opinions include concurring, dissenting, and concurring in part or dissenting in part opinions).

242. *Id.* at 45.

243. *Id.*

244. *Id.* at 47.

245. *Id.* at 2.

246. 547 U.S. 813 (2006).

247. 128 S. Ct. 2379 (2008).

dispositions, 1105 had first been appealed to the court of appeals.²⁴⁸ Of the 1015 petitions for transfer, “[t]he [s]upreme [c]ourt accepted jurisdiction and issued opinions in approximately 8% [of the cases] (12% in civil cases and 7% in criminal cases).”²⁴⁹ In the remaining 92% of cases, the supreme court declined review, certifying the decision of the court of appeals.²⁵⁰ After conveying these statistics, the supreme court recognized that “[t]he appellate work of the Indiana Supreme Court would not be possible without the outstanding foundational work provided by the Indiana Court of Appeals, trial courts, and Tax Court.”²⁵¹

B. Other Supreme Court Endeavors

On February 24, 2008, the five justices currently serving on the supreme court became the longest-serving supreme court in Indiana’s history at 3040 consecutive days.²⁵² Technology was in the spotlight during the 2008 fiscal year, as evidenced by improvements made to the “Odyssey” case management system that “will eventually connect all Indiana courts and state agencies and improve public access to court records.”²⁵³ At the close of the fiscal year, the nine Monroe County Circuit Courts and the Washington Township Small Claims Court began using Odyssey to store and manage information on their cases.²⁵⁴ Additionally, the Courts in the Classroom project webcasted every supreme court oral argument and select court of appeals arguments, adding 87 arguments to the online archive where more than 460 oral arguments can be viewed.²⁵⁵

C. Case Data from the Court of Appeals

During the 2008 calendar year, the court of appeals disposed of 2752 cases—2739 by majority opinion and 13 by order.²⁵⁶ The court of appeals heard 78 oral arguments, including one stay hearing, and the average age of cases pending on December 31, 2007 was 1.6 months.²⁵⁷ The court handed down 7115 miscellaneous orders, mainly on motions for additional time.²⁵⁸ Judge John T.

248. 2008 ANNUAL REPORT, *supra* note 239, at 2.

249. *Id.*

250. *Id.*

251. *Id.* at 2-3.

252. *Id.* at 5. The five justices that currently comprise the supreme court are : Chief Justice Randall T. Shepard and Justices Brent E. Dickson, Frank Sullivan, Jr., Theodore R. Boehm, and Robert D. Rucker. *Id.*

253. *Id.* The Supreme Court’s Judicial Technology and Automation Committee (JTAC) is responsible for the Odyssey program. *Id.*

254. *Id.*

255. *Id.* at 6. These oral arguments can be found at <http://www.indianacourts.org/apps/webcasts/>.

256. COURT OF APPEALS OF INDIANA 2008 ANNUAL REPORT, at 1 (2008), *available at* <http://www.in.gov/judiciary/appeals/docs/2008report.pdf>

257. *Id.*

258. *Id.*

Sharpnack retired to become a Senior Judge on May 4, 2008, and Judge Elaine B. Brown was sworn in as a member of the court of appeals on May 5, 2008.²⁵⁹

The court of appeals continued its "Appeals on Wheels" program in 2008, which is the court's traveling oral argument program designed to familiarize Indiana residents with the court.²⁶⁰ For example, last year the court held oral arguments in the cities of Hammond, Lafayette, French Lick, Valparaiso, Muncie, Crawfordsville, Bloomington, and Evansville.²⁶¹

D. Clever Prose from the Court of Appeals

The court of appeals invoked humor and vivid imagery during the reporting term. For example, in his dissent to an unpublished memorandum decision, Judge James S. Kirsch summarized the facts of *Gunkel v. Renovations, Inc.*²⁶² as follows:

Multiple motions. Multiple hearings. Multiple judges. Parties admitting they entered into a contract, then denying that they entered into a contract. Bifurcated trials. Inconsistent positions. Inconsistent rulings. Summary judgments granted. Summary judgments denied. Summary judgments granted but not followed. Three appeals. Eight years and still unresolved. Attorney fees in excess of the amount in controversy.

It will soon be ten years since the Gunkels entered into a contract for construction of their new home. During this decade, they have not been served well by either their contractors or our legal system. Were Dante Alighieri alive today, this case would provide him with the material to add a tenth circle to his *Inferno* and call it "Litigation Hell."²⁶³

In *Henri v. Curto*,²⁶⁴ the court of appeals analyzed the effect of a bailiff's comment to a holdout juror in response to her question regarding whether the jury's verdict had to be unanimous. Citing the classic legal film "12 Angry Men," the court noted:

A plausible effect of the judge's instruction would be that jurors in the minority who are adamant that the majority is wrong may hold out to prevent a verdict. However, the statement by the bailiff conveys that jurors in the minority would face the daunting task of swaying all the other jurors if they are to stick to their convictions, a task surmountable

259. *Id.* at 2.

260. See Indiana Court of Appeals, Oral Arguments, <http://www.in.gov/judiciary/appeals/arguments.html> (last visited June 18, 2009).

261. *Id.*

262. No. 76A03-0609-CV-407, slip op. at 28-29 (Ind. Ct. App. Jun. 27, 2008), *trans. denied*, No. 76S03-0901-CV-19, 2009 Ind. LEXIS 237 (Ind. Mar. 4, 2009).

263. *Id.*

264. 891 N.E.2d 135 (Ind. Ct. App. 2008), *rev'd*, 2009 Ind. LEXIS 489 (Ind. 2009).

in less than two hours on the silver screen if you are Henry Fonda, but a task that could be overwhelming in real life for the average juror.²⁶⁵

In his dissent in *Gray v. State*,²⁶⁶ an unpublished memorandum decision, Judge Michael P. Barnes expounded upon a clever observation he made in *Davis v. State*.²⁶⁷ The issue in *Davis* was whether a BB gun could serve as a deadly weapon for purposes of elevating the crime from a class C to a class B felony based on the defendant's use of a deadly weapon.²⁶⁸ Rebuking the tendency to rely heavily on the victim's belief or fear that the perpetrator was armed with a deadly weapon, Judge Barnes argued in *Davis* that

[t]o the extent that the victims here were afraid of Davis and his accomplice, that is already a necessary element of the base offense of robbery as a class C felony. . . . The key factor, I believe, that distinguishes using a "deadly weapon" to commit robbery and elevates it to a Class B felony is that there is an actual heightened risk of harm to the victim.²⁶⁹

Judge Barnes observed that taken to its extreme, the majority position in *Davis* "could lead a finger or a stick of butter to be found a 'deadly weapon,' if a robber were to point the finger or stick of butter from underneath a coat and was able to convince the victim that it was actually a gun."²⁷⁰

In *Gray*, Judge Barnes applied his logic from *Davis* and noted that "although this case does not involve a finger or a stick of butter, here an electric shaver has been converted into a gun. . . . There is no claim or argument on appeal that an electric shaver could be a deadly weapon."²⁷¹ Consequently, Judge Barnes dissented from the majority's decision and concluded that "[b]ecause of the lack of proof that Gray committed these crimes while armed with a deadly weapon, I vote to reduce his robbery convictions to Class C felonies."²⁷² Regardless of whether one agrees with Judge Barnes's legal conclusion, the thought of a stick of butter serving as a deadly weapon does present a comical image to make his point.

CONCLUSION

This survey term marked another productive year for Indiana's appellate courts. Although the Appellate Rules were reworked almost ten years ago, the supreme court and court of appeals continue to interpret and apply the rules to

265. *Id.* at 142 (citing 12 ANGRY MEN (Orion-Nova Productions 1957)).

266. No. 10A01-0708-CR-356, slip op. at 22-24 (Ind. Ct. App. June 6, 2008), *aff'd*, 903 N.E.2d 940 (Ind. 2009).

267. 835 N.E.2d 1102 (Ind. Ct. App. 2005).

268. *Gray*, No. 10A01-0708-CR-356, slip. op. at 22.

269. *Id.* at 23 (quoting *Davis*, 835 N.E.2d at 1117-18 (Barnes., J. concurring)).

270. *Id.* (citing *Davis*, 835 N.E.2d at 1117).

271. *Id.* at 24.

272. *Id.* at 24-25.

refine appellate practice in Indiana and enhance the efficiency of our judicial system. Indiana's citizens, bench, and bar all benefit from the efforts of our appellate courts in this arena.

RECENT DEVELOPMENTS IN INDIANA BUSINESS AND CONTRACT LAW

MICHAEL A. DORELLI*

During the survey period,¹ Indiana's courts rendered a number of significant decisions impacting businesses, as well as their owners, officers, directors and shareholders. The Indiana legislature also passed into law a new state Securities Act, providing clarification and uniformity regarding significant rules and regulations. These and other developments of interest to business litigators, and corporate transactional lawyers, as well as business owners and in-house counsel, are discussed herein.

I. SECURITIES LITIGATION AND REGULATION

A. Director's Derivative Liability Under Indiana's Securities Law

In *Lean v. Reed*,² the Indiana Supreme Court held that an outside director failed to meet his burden of proving the statutory "reasonable care" defense to personal liability for the corporation's securities registration and disclosure violations under Indiana's Securities Law (ISL).³ The plaintiffs in *Lean* were the founders and shareholders of Abacus Computer Services, Inc. (Abacus).⁴ In "very late March" of 2000, Galaxy Online, Inc. (GOLI), an internet business, entered into an agreement to acquire Abacus.⁵ Pursuant to the transaction, which closed on March 31, 2000, Abacus shareholders were issued 600,000 shares of GOLI common stock.⁶ The GOLI shares were not registered as "securities" in Indiana.⁷

The plaintiffs sued GOLI, an affiliated company, and 10 individuals who were officers, directors, or controlling persons of GOLI, alleging the "sale of unregistered securities in violation of section 3 of the ISL⁸ and material misrepresentations and omissions in violation of section 12(2)."⁹ The plaintiffs'

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1. This Article discusses select Indiana Supreme Court and Indiana Court of Appeals decisions during the survey period—i.e., from October 1, 2007, through September 30, 2008, except where otherwise indicated—as well as significant statutory developments during the survey period.

2. 876 N.E.2d 1104 (Ind. 2007).

3. *Id.* at 1113-14. At the time of the *Lean* decision, the ISL was found at sections 23-2-1-1 to 25 of the Indiana Code.

4. *Id.* at 1105-06.

5. *Id.* at 1106.

6. *Id.*

7. *Id.*

8. *See* IND. CODE § 23-2-1-3 (2007) (providing that "[i]t is unlawful for any person to offer or sell any security in Indiana unless it is registered [or it] is exempted [from registration]").

9. *Lean*, 876 N.E.2d at 1106; *see also* IND. CODE § 23-2-1-12 (2007) (providing that "[i]t

claims against the individual defendants, including Lean, were based on the “derivative liability” provisions found in section 19(d) of the ISL, which provides, in relevant part:

[A] partner, officer or director of [a person liable under the ISL] [is] also liable jointly and severally with and to the extent as the person, *unless* the person who is liable sustains the burden of proof that *the person did not know and in the exercise of reasonable care could not have known, of the existence of the facts by reason of which the liability is alleged to exist*.¹⁰

The “net effect of [the above-cited provisions of the ISL] is that a director of a selling corporation who cannot sustain the reasonable care defense is liable for both registration and disclosure violations by the corporation.”¹¹

The plaintiffs moved for summary judgment against Lean, arguing that Lean was liable pursuant to section 19(d).¹² The trial court granted summary judgment in favor of the plaintiffs, rejecting Lean’s “reasonable care” defense.¹³ The Indiana Court of Appeals affirmed the trial court’s ruling,¹⁴ and the Indiana Supreme Court granted transfer.¹⁵ On transfer, Lean argued “that, as a matter of law, it is reasonable care for a director to assume that management and its advisors have taken the appropriate steps to comply with legal requirements.”¹⁶ Lean argued “that this is particularly true of a director new to the board at the time the securities transaction is approved.”¹⁷ Lean conceded that he voted in favor of the transaction at the March 28, 2000, meeting of GOLI’s board of directors, and that he “did not ask any questions that would have allowed him to discover that the stock being sold by GOLI was not registered.”¹⁸ Alternatively, on transfer, Lean argued that “summary judgment is never appropriate to resolve a question of ‘reasonable care’ because it is ultimately a question for the trier of fact.”¹⁹

is unlawful for any person in connection with the offer, sale or purchase of any security, either directly or indirectly, . . . (2) to make any untrue statements of material fact or to omit to state a material fact necessary in order to make the statement made in light of the circumstances under which they are made, not misleading”).

10. IND. CODE § 23-2-1-19(d) (2007) (emphasis added).

11. *Lean*, 876 N.E.2d at 1107.

12. *Id.* at 1106.

13. *Id.*

14. *Id.* at 1107 (citing *Lean v. Reed*, 854 N.E.2d 79 (Ind. Ct. App. 2006)).

15. *Id.*

16. *Id.* at 1108.

17. *Id.* Lean was elected to the GOLI board of directors on February 18, 2000, i.e., just over a month before the Abacus transaction was approved and closed. *Id.* at 1111. Lean’s first board meeting, at which the transaction was approved, was on March 28, 2000—just thirty nine days after Lean was elected a director and three days before the transaction closed. *Id.* at 1111-12.

18. *Id.* at 1112.

19. *Id.* at 1108.

The court in *Lean* encapsulated the issue before it as follows: “[W]hether it is sufficient for an outside director to assume compliance with all applicable laws with no explicit assurance from anyone, no documentation, and in the face of a number of facts that raise obvious points of inquiry.”²⁰ The court explained that “a director can reasonably rely on assertions from counsel and others with expertise as to some legal conclusions.”²¹ However, the court found that, in this case, “there was no evidence of assurance from counsel, whether made directly by counsel or not, that the law applicable to the Abacus acquisition had been examined and that the transaction conformed to all applicable law.”²² Further, there was no “evidence that lawyers familiar with securities or financing issues had reviewed the transaction.”²³ Based on the “undisputed facts,” the court in *Lean* concluded, “Lean knew, or in the exercise of reasonable care could have known, that the disputed transaction involved the unlawful issuance of unregistered securities. Accordingly, we hold as a matter of law the defense of reasonable care was not established.”²⁴

Finally, the court rejected Lean’s argument that the issue of “reasonable care” under section 19(d) is always a question of fact, i.e., that resolution of the “reasonable care” defense is inappropriate for summary judgment disposition.²⁵ The court agreed that “summary judgment is rarely appropriate as to a director’s reasonable care.”²⁶ However, the court explained, “in extreme cases conduct may be reasonable or unreasonable as a matter of law just as negligence may be established as a matter of law.”²⁷ The court described its bases for finding “legal” disposition appropriate in this case, as follows:

If Lean had been told by a respectable authority that his transaction complied with legal requirements, it would create a factual issue as to the reasonableness of his unquestioning acceptance. But the undisputed facts of this case are that Lean assumed this transaction complied with applicable law based on no assurance or documentation from anyone. A director who makes this assumption does not meet the standard required by the ISL that in the exercise of reasonable care he could not have known of the facts constituting the violation.²⁸

“Reasonable inquiry, or receipt of reasonable assurance, is one thing,” the court explained.²⁹ “But blind assumption that all is well leaves the investing public in

20. *Id.* at 1111.

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.* at 1113-14.

26. *Id.* at 1113.

27. *Id.*

28. *Id.* at 1113-14.

29. *Id.* at 1114.

the same position as if there were no directors of the corporation.”³⁰ The ISL “requires more of a director than a simple assumption that all is well.”³¹

B. Indiana’s New Uniform Securities Act

Effective July 1, 2008, the Indiana General Assembly passed the new Indiana Uniform Securities Act (the IUSA),³² which is patterned, in large part, on the Uniform Securities Act of 2002. The new IUSA is now found at Article 19 of Title 23 of the Indiana Code, and is comprised of 6 chapters covering the following subject matter:

Chapter 1: General provisions,³³ including a more detailed and thorough “definitions” section;³⁴

Chapter 2: Exemptions from registration and disclosure requirements of the IUSA;³⁵

Chapter 3: Registration of securities and notice filing of “federal covered securities,”³⁶

Chapter 4: Broker-dealers, agents, investment advisers, investment adviser representatives, and federal covered investment advisers;³⁷

Chapter 5: Fraud and liabilities, including provisions dictating both criminal penalties and civil liability;³⁸ and

Chapter 6: Administration and judicial review.³⁹

Although a detailed evaluation of the IUSA, its differences from the prior version of the Act and its impact on practitioners going forward is outside the scope of this Article, a brief summary of just a few of the noteworthy changes follows.

30. *Id.*

31. *Id.* The Indiana Supreme Court affirmed the trial court’s grant of summary judgment against Lean on the “reasonable care” defense. *Id.*

32. IND. CODE §§ 23-19-1-1 to -6-11 (2008). The predecessor version of Indiana’s Securities Act, enacted in 1961 and based on the Uniform Securities Act of 1956, was found at Article 2 of Title 23.

33. IND. CODE §§ 23-19-1-1 to -5.

34. *Id.* § 23-19-1-2.

35. *Id.* §§ 23-19-2-1 to -4.

36. *Id.* §§ 23-19-3-1 to -7.

37. *Id.* §§ 23-19-4-1 to -12.

38. *Id.* §§ 23-19-5-1 to -10.

39. *Id.* §§ 23-19-6-1 to -11.

1. *“Investment Contract” Includes Interest in a Limited Liability Company.*—The “definitions” section of the IUSA is more detailed than that of the predecessor Act. Significantly, the IUSA’s definition of a “security,” which, like the predecessor version of the Act, includes an “investment contract,” now includes five sub-sections describing specific categories of investment vehicles that are “include[d]” or not “include[d]” within the definition.⁴⁰ One of those sub-sections provides that the definition of a “security” specifically “includes as an ‘investment contract’, among other contracts, *an interest in a . . . limited liability company.*”⁴¹ The IUSA does not expressly clarify whether *all* “interests” in limited liability companies will meet the definition of a “security.”⁴² Prior to enactment of the IUSA, whether or not an interest in an LLC was a “security” depended on whether the interest met the definition of an “investment contract,” as defined by applicable case law.⁴³ Arguably, the specification in the IUSA that the definition of a security “includes as an ‘investment contract’”⁴⁴ an interest in an LLC indicates that the test for an “investment contract” must still be satisfied. In other words, an LLC interest may have been included within the definitional section to clarify that an LLC interest can, if the applicable test for an “investment contract” is satisfied, constitute a “security” under the IUSA.⁴⁵

2. *Private Placement Exemption Replaced with “Self-Executing” Limited Offering Exemption.*—The detailed private placement exemption contained in the predecessor Act⁴⁶ has been replaced in the IUSA with a simplified “self-executing” exemption for limited offerings.⁴⁷ The new exemption does not require the filing of an offering statement or other written materials (as did the predecessor private placement exemption, depending on the size of the offering and characteristics of the offerees)—i.e., it is “self-executing”—as long as the conditions dictated therein are satisfied.⁴⁸ Generally, the new limited offering exemption applies to transactions meeting the following criteria: (1) the issue is

40. *See id.* § 23-19-1-2(28)(A)-(E).

41. *Id.* § 23-19-1-1(28)(E) (emphasis added).

42. *See id.*

43. *See, e.g.,* SEC v. W.J. Howey Co., 328 U.S. 293, 298-99 (1946) (defining “investment contract” as “a contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party”).

44. *See* IND. CODE § 23-19-1-2(28)(E) (2008).

45. The test for an “investment contract,” as described by *Howey* and its progeny, appears to have been codified in section 2(28)(D) of the IUSA, which provides the following:

[The definition of a “security”] includes as an “investment contract” an investment in a common enterprise with the expectation of profits to be derived primarily from the efforts of a person other than the investor and a “common enterprise” means an enterprise in which the fortunes of the investor are interwoven with those of either the person offering the investment, a third party, or other investors

Id. § 23-19-1-2(28)(D).

46. IND. CODE § 23-2-1-2(b)(10) (2007).

47. IND. CODE § 23-19-2-2(14) (2008).

48. *Id.*

made to “not more than twenty-five purchasers . . . other than [‘institutional investors’]”; (2) a “general solicitation or general advertising is not made in connection with the offer to sell or sale of the securities;” (3) no “commission or other remuneration” is paid “or given, directly or indirectly,” to an unregistered broker or agent; and (4) “the issuer reasonably believes that all the purchasers . . . are purchasing for investment.”⁴⁹

3. *Registration of “Finders.”*—Under the new IUSA, so-called “finders”—i.e., “agents” representing issuers with respect to an *offer or sale* of the issuer’s securities—must be registered under the IUSA if they are “compensated in connection with the individual’s participation by the payment of commissions or other remuneration based, directly or indirectly, on transactions in those securities.”⁵⁰ Individuals representing issuers “in connection with the *purchase* of the issuer’s own securities”⁵¹ are exempt from registration.⁵²

4. *Registration of “Investment Advisers.”*—The “investment adviser” exemption now provides that investment advisers with “no more than five (5) clients that are resident in [Indiana]” are exempt from registration *only if* the investment adviser has no “place of business in this state.”⁵³

5. *Fraud and Liabilities, Including “Control Person” and Director Liability.*—The fraud and liability provisions of the IUSA remain substantially unchanged from the predecessor Act’s analogous provisions. It continues to be “unlawful for a person, in connection with the offer, sale or purchase of a security, directly or indirectly[,],”⁵⁴ to do any of the following:

(1) to employ a device, scheme, or artifice to defraud; (2) to make an untrue statement of a material fact or to omit to state a material fact necessary in order to make the statement made, in the light of the circumstances under which they were made, not misleading; or (3) to engage in an act, practice, or course of business that operates or would operate as a fraud or deceit upon another person.⁵⁵

The “knowing” violation of Article 5, with specified exceptions, constitutes a Class C felony.⁵⁶ Civil liability is imposed on a “person” who sells a security in violation of Article 5, unless “the person selling the security sustains the burden of proof that either the person did not know, and in the exercise of reasonable care could not have known, of the violation or the purchaser knowingly participated in the violation.”⁵⁷

Joint and several liability continues to be imposed on (1) a person that

49. *Id.*

50. *Id.* § 23-19-4-2(a), (b)(3).

51. *Id.* § 23-19-4-2(b)(7) (emphasis added).

52. *Id.*

53. *Id.* § 23-19-4-3(b)(2).

54. *Id.* § 23-19-5-1.

55. *Id.* § 23-19-5-1 to -1(3).

56. *Id.* § 23-19-5-8(a).

57. *Id.* § 23-19-5-9(a).

“directly or indirectly controls a person liable under [the civil liability provisions of the IUSA]”⁵⁸ and (2) an individual “who is a managing partner, executive officer, or director of a person liable under [the civil liability provisions],”⁵⁹ unless the “controlling person” or the “individual” partner, officer or director sustains the burden of proof that he or she “did not know, and in the exercise of reasonable care could not have known, of the existence of conduct by reason of which the liability is alleged to exist.”⁶⁰ Other than minor changes, the “joint and several” liability provisions, including the statement of the “reasonable care” defense thereto, remain unchanged from the prior statute. As such, the analysis of the “reasonable care” defense outlined by the Indiana Supreme Court in *Lean v. Reed*,⁶¹ discussed above, remains good law.⁶²

II. CORPORATE AND SHAREHOLDER LIABILITY

A. Piercing the Corporate Veil—“Alter Ego” Doctrine

In *Massey v. Conseco Services, LLC*,⁶³ the court ruled that a subsidiary corporation that loaned money to a director of a parent corporation (in order to purchase stock of the parent corporation) was not an “alter ego” of the parent corporation, for purposes of the director’s defenses against the parent.⁶⁴ From 1996 to 2000, Conseco, Inc. (Conseco) had a program “known as the D&O Loan Program” (the Program). Pursuant to the Program, Conseco made arrangements with several banks to loan money to its directors and officers for the purchase of Conseco stock.⁶⁵ “Conseco guaranteed the loans.”⁶⁶ Conseco’s subsidiary, Conseco Services, LLC (Conseco Services), also loaned money to the directors and officers “to cover the interest owed on the loans from the banks.”⁶⁷

The plaintiff participated in the Program from 1996 to 2000, borrowing approximately \$15 million to purchase Conseco stock.⁶⁸ The plaintiff also signed a promissory note in favor of Conseco Services, to cover interest on his bank loan in the amount of more than \$4 million.⁶⁹ In April 2000, Conseco “acknowledged that it had overstated its income on its quarterly financial statements in 1999 by \$376.6 million.”⁷⁰ “The value of Conseco shares dropped as the maturity date on

58. *Id.* § 23-19-5-9(d)(1).

59. *Id.* § 23-19-5-9(d)(2).

60. *Id.* § 23-19-5-9(d)(2).

61. 876 N.E.2d 1104 (Ind. 2007).

62. Compare IND. CODE § 23-2-1-19(d) (2007), with IND. CODE § 23-19-5-9(d)(2) (2008).

63. 879 N.E.2d 605 (Ind. Ct. App. 2008).

64. *Id.* at 609-10.

65. *Id.* at 607.

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

[the plaintiff's] Note with Consecro Services approached."⁷¹

In December 2002, the plaintiff's stock lost all its value when Consecro filed for bankruptcy.⁷² Consecro Services sued the plaintiff on the note he executed to cover interest on the bank loans, and the plaintiff asserted several affirmative defenses and counterclaims, primarily based on the conduct of Consecro.⁷³ In other words, the plaintiff asserted defenses and counterclaims seeking "to hold Consecro Services liable by alleging Consecro Services is the alter ego of Consecro."⁷⁴

The court in *Massey* explained the "alter ego" theory as follows:

"The legal fiction of a corporation may be disregarded where one corporation is so organized and controlled and its affairs so conducted that it is a mere instrumentality or adjunct of another corporation. Indiana courts refuse to recognize corporations as separate entities where the facts establish that several corporations are acting as the same entity."⁷⁵

The court continued, explaining that "[t]he party seeking to pierce the corporate veil bears the burden of proving the corporate form was so ignored, controlled or manipulated that it was merely the instrumentality of another and that the misuse of the corporate form would constitute a fraud or promote injustice."⁷⁶

In affirming the trial court's summary judgment ruling, as a matter of law, the court in *Massey* explained that the "alter ego" doctrine "may be invoked to prevent fraud or unfairness to third parties."⁷⁷ The court concluded that the plaintiff "was an outside director, but he was not a third party. He was a director of Consecro and understood the corporate organization of Consecro and Consecro Services."⁷⁸ The court also concluded that the plaintiff failed to designate any evidence that the corporations "abused the corporate form or that such abuse would result in a fraud or injustice to him."⁷⁹ The court held that the plaintiff "could not treat Consecro Services as the alter ego of Consecro."⁸⁰

In *French-Tex Cleaners, Inc. v. Cafaro Co.*,⁸¹ the court held that a corporation that shared office space with a landlord was not liable for the landlord's alleged breach of contract (or conversion) under "alter ego" or

71. *Id.* at 608.

72. *Id.*

73. *Id.* at 608-09.

74. *Id.* at 609.

75. *Id.* (quoting *Oliver v. Pinnacle Homes, Inc.*, 769 N.E.2d 1188, 1191 (Ind. Ct. App. 2002)) (internal quotations omitted).

76. *Id.* (internal quotations omitted).

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. 893 N.E.2d 1156 (Ind. Ct. App. 2008).

piercing the corporate veil theories.⁸² The landlord and tenant in *French-Tex* became involved in a dispute regarding real estate taxes.⁸³ The dispute led to the tenant, a dry cleaning business, filing a class action complaint, alleging that the landlord and the second corporation, Cafaro, overcharged the tenant (and other commercial tenants of various shopping centers) for their shares of property taxes.⁸⁴ The tenant alleged breach of contract, conversion, unjust enrichment, and fraud.⁸⁵ Although Cafaro was not a party to the subject lease, the tenant alleged that the two defendants shared office space, telephone and computer systems, and some officers. Further, the tenant alleged that the landlord's invoices were actually prepared by Cafaro's employees, and other issues that allegedly gave rise to liability.⁸⁶ The trial court granted summary judgment in favor of Cafaro, and the tenant appealed.⁸⁷

The court recognized that although Cafaro was not a party to the lease, "liability could be imputed . . . if Cafaro was acting as [the landlord's] alter ego."⁸⁸ The court explained that it was the tenant's burden to establish that the landlord "was so ignored, controlled, or manipulated that it was merely the instrumentality of Cafaro and that the misuse of the corporate form would constitute a fraud or promote injustice."⁸⁹ The court enumerated the categories of evidence required to satisfy the tenant's burden of proof on the tenant's "alter ego" theory:

- (1) [The landlord's] undercapitalization; (2) absence of corporate records; (3) fraudulent representation by the corporation shareholders or directors; (4) use of the corporation to promote fraud, injustice or illegal activities; (5) payment by the corporation of individual obligations; (6) commingling of assets and affairs; (7) failure to observe required corporate formalities; or (8) other shareholder acts or conduct ignoring, controlling, or manipulating the corporate form.⁹⁰

The court of appeals concluded that "[l]ike the trial court, we find no genuine issue of material fact regarding Cafaro's liability for breach of contract under the [lease between the landlord and tenant]."⁹¹ The court summarized the respective parties' arguments and "facts" relied upon in support, but did not analyze the facts or specify which of them was persuasive or dispositive on the issue.⁹²

82. *Id.* at 1169.

83. *Id.* at 1159-60.

84. *Id.* at 1160.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.* at 1168.

89. *Id.* at 1168-69.

90. *Id.* at 1169.

91. *Id.*

92. *Id.*

B. Corporate Liability for Criminal Act of Employee

In *Prime Mortgage USA, Inc. v. Nichols*,⁹³ the court held that a corporation could be held liable for its employee-shareholder's forgery of a share authorization form, allegedly causing damage to the other shareholder.⁹⁴ Specifically, the plaintiff and defendant shareholders—Nichols and Law, respectively—were, at one time, the sole shareholders of the corporation.⁹⁵ The business relationship between the shareholders deteriorated, and Nichols decided she wanted to sell her stock.⁹⁶ The parties were unable to negotiate a buyout; so, Nichols filed a complaint seeking appointment of a receiver and dissolution, arguing that she and Law each owned half of the company's shares.⁹⁷ Law responded, claiming that he had previously issued company stock to his daughter and another company employee, pursuant to a share authorization document allegedly signed by Nichols.⁹⁸ Nichols later learned that Law had forged her signature on the share authorization document and sought, among other things, to hold both Law and the corporation liable for the forgery under Indiana's crime victims statute.⁹⁹

Pursuant to section 35-41-2-3 of the Indiana Code

[A] corporation may be held liable for an employee's criminal acts as long as the employee was acting within the scope of employment. The company may be held liable, if the employee's purpose, was to an appreciable extent, to further his employer's business, even if the act was predominantly motivated by an intention to benefit the employee himself. Even if a particular act was not authorized by the corporation, if there is a sufficient association between the authorized acts and the unauthorized acts, the unauthorized acts may fall within the scope of employment.¹⁰⁰

The court in *Nichols* stated that “[a]n elaborate discussion on this point is not necessary to explain [its] conclusion that Law was acting within the scope of his employment when he forged Nichols' name.”¹⁰¹ According to the court, although Law forged the share authorization document with the intent to benefit himself to the detriment of Nichols, the act also furthered the corporation's business.¹⁰² As such, the court concluded that the corporation could be held liable under

93. 885 N.E.2d 628 (Ind. Ct. App. 2008).

94. *Id.* at 655.

95. *Id.* at 637.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.* at 637-38; *see also* IND. CODE § 34-24-3-1 (2008).

100. *Id.* at 654-55 (internal quotations omitted).

101. *Id.* at 655

102. *Id.*

Indiana's crime victims statute.¹⁰³

C. Doctrine of Contribution Applied to Shareholders of Failed Business

In *Balvich v. Spicer*,¹⁰⁴ the Indiana Court of Appeals discussed the doctrine of "contribution" in the context of shareholders of a failed Hardee's franchise business.¹⁰⁵ The Balviches and the Spicers owned varying interests in the corporate entities that owned the franchises.¹⁰⁶ The corporations had obtained more than \$700,000 in loans from Bank One and AT&T Financial Corporation.¹⁰⁷ When the franchises began to fail, the corporations defaulted on the loans and the lenders foreclosed.¹⁰⁸ The shareholders had personally guarantied the loans and, ultimately, judgments were entered against them.¹⁰⁹ The Spicers paid significantly more than the Balviches to release their obligations under the judgments.¹¹⁰ The corporations also owed past due amounts for state sales tax and employee withholding taxes.¹¹¹ The Spicers paid approximately \$75,000 to satisfy the corporations' tax obligations.¹¹²

The Spicers filed an action against the Balviches for contribution regarding the amounts paid in connection with the Bank One, AT&T and state tax payments.¹¹³ The trial court entered judgment in favor of the Spicers and the Balviches appealed.¹¹⁴

After finding that the Spicer's claims were not barred by the applicable statute of limitations, the court in *Spicer* turned to the contribution claim, explaining that "the doctrine of contribution rests on the principle that where parties stand in equal right, equality of burden becomes equity."¹¹⁵ Further, the court explained: "[T]he right of contribution is based upon natural Justice, and it applies to any relation, including that of joint contractors, where equity between the parties is equality of burden, and one of them discharges more than his share of the common obligation."¹¹⁶ The court also noted that section 26-1-3.1-116 of the Indiana Code provides, in relevant part, that "a party having joint and several liability who pays the instrument is entitled to receive from *any party*

103. *Id.*

104. 894 N.E.2d 235 (Ind. Ct. App. 2008).

105. *Id.* at 237. The Hardee's franchises were located throughout Indiana and were owned by several separate corporations of which the parties in *Spicer* were shareholders. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.* at 238.

113. *Id.*

114. *Id.* at 238, 242.

115. *Id.* at 245 (internal quotations omitted).

116. *Id.* (internal quotations omitted).

having the same joint and several liability contribution in accordance with applicable law."¹¹⁷

The court in *Spicer* found that the evidence supported the trial court's ruling in favor of contribution from the Balviches, because they were jointly and severally liable under their personal guaranties.¹¹⁸ The court also rejected the Balviches' statutory argument that contribution could not be pursued because the judgments had not been paid "in full" or "in their entirety."¹¹⁹ Finally, the court ruled that the trial court had jurisdiction to award contribution regarding the state tax liability.¹²⁰ The court explained that the "propriety of imposition of a tax"—which arguably would have been within the exclusive jurisdiction of the Indiana Tax Court—was not at issue.¹²¹ Rather, the issue was whether contribution for the amount paid by the Spicers was proper.¹²²

III. "AUTHORITY" OF EXECUTIVE DIRECTOR AND "REMOVED" DIRECTOR TO FILE ACTION AGAINST BOARD MEMBERS

In *Martindale Brightwood CDC v. Gore*,¹²³ the court held that a non-profit corporation's executive director lacked standing to file suit against board members, but that a "removed" director was authorized by statute to allege that his removal was invalid and improper.¹²⁴ The executive director and the recently "removed" director filed suit against the corporation's board members, alleging breach of contract, intentional interference with contract, misfeasance, breach of fiduciary duty, and breach of the standard of care of directors.¹²⁵ The board members moved to dismiss, for failure to name the real party in interest, arguing that neither the executive director nor the former director was authorized by statute to file suit.¹²⁶ The trial court granted the motion to dismiss.¹²⁷

Section 23-17-4-4(b) of the Indiana Code provides, "A corporation's power to act may be challenged in a proceeding against the corporation for a declaratory judgment or to enjoin an act where a third party has not acquired rights. The proceeding may be brought by the Attorney General *or a director*."¹²⁸ A "director" is defined in the statute as "an individual designated in articles of incorporation or bylaws, elected by the incorporators *or otherwise elected or*

117. *Id.* (quoting IND. CODE § 26-1-3.1-116).

118. *Id.*

119. *Id.* at 247 (discussing IND. CODE § 34-22-1-6 (2006)).

120. *Id.* at 247-48.

121. *Id.* at 248.

122. *Id.* at 248-49.

123. 878 N.E.2d 1280 (Ind. Ct. App. 2008).

124. *Id.* at 1284, 1285.

125. *Id.* at 1281.

126. *Id.* at 1281-82.

127. *Id.* at 1282.

128. *Id.* at 1283 (quoting IND. CODE § 23-17-4-4(b) (2007)).

appointed, to act as a member of a board of directors."¹²⁹

Regarding the executive director, the court in *Martindale* rejected the executive director's argument that, pursuant to the corporation's by-laws, she was a "non-voting member" of the board.¹³⁰ Specifically, the court explained that the by-laws merely provide that the executive director will attend meetings of the board of directors, but they "in no way [designate] the Executive Director as a person to act as a member of [the board of directors]."¹³¹ Further, pursuant to the executive director's employment agreement with the corporation, the executive director was required to "report to" the board, "advise" the board, and "see that all orders and resolutions of the [board were] carried into effect."¹³² The court concluded that the executive director "clearly was an employee of [the corporation] and not a director as she argue[d]."¹³³

Regarding the "removed" director, the director alleged in the complaint that his removal from the board was "improper" and "invalid," in that it was not done in compliance with the corporation's by-laws.¹³⁴ The court directed that in ruling on a motion to dismiss, "it must accept as true the facts alleged in the complaint."¹³⁵ As such, the court accepted as true the fact that the director-plaintiff's removal was "improper and therefore void."¹³⁶ If his removal was void, the court explained, "he would have standing to bring a proceeding pursuant to Indiana Code section 23-17-4-4(b)."¹³⁷ Therefore, the court reversed the trial court's dismissal of the director's complaint on standing grounds.¹³⁸

IV. INSPECTION OF CORPORATE BOOKS AND RECORDS

In *Bacompt Systems, Inc. v. Peck*,¹³⁹ the court of appeals concluded that a hearing on a petition to inspect corporate records "constituted a trial within the meaning of [Indiana] Trial Rule 43(A)."¹⁴⁰ As such, the court held, it was improper for the trial court to base its findings and conclusions regarding whether a "proper purpose" for the inspection existed on an affidavit.¹⁴¹ Rather,

129. *Id.* (quoting IND. CODE § 23-17-2-9 (2007)).

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.* The court in *Martindale* also noted that the corporation's articles of incorporation provide that directors "shall be elected." *Id.* at 1284. The executive director was appointed—not elected—further refuting her argument that she was a "director" within the meaning of the corporation's articles. *Id.*

134. *Id.* at 1284.

135. *Id.* at 1285 (citing *Trail v. Boys & Girls Clubs*, 845 N.E.2d 130, 134 (Ind. 2006)).

136. *Id.*

137. *Id.*

138. *Id.*

139. 879 N.E.2d 1 (Ind. Ct. App. 2008).

140. *Id.* at 5.

141. *Id.*

live testimony was required, in open court.¹⁴²

Section 23-1-52-2 of the Indiana Code provides, in relevant part: “A shareholder of a corporation is entitled to inspect and copy, during regular business hours at a reasonable location specified by the corporation, [various categories of] records of the corporation . . . if . . . the shareholder’s demand is made in good faith and for a proper purpose.”¹⁴³

One of the parties seeking records in *Bacompt* filed an affidavit in support of the petition, stating “that she needed access to [the requested] corporate records in order to value her stock in her pending divorce proceeding.”¹⁴⁴ The trial court concluded that a “proper purpose” had been demonstrated and granted the petition.¹⁴⁵

On appeal, the corporation argued, among other things, that the trial court’s reliance on the petitioner’s affidavit violated Indiana Trial Rule 43(A), which provides that “[i]n all trials the testimony of witnesses shall be taken in open court.”¹⁴⁶ The court of appeals agreed, describing the nature of a hearing on a petition to inspect corporate records as follows: “[T]he hearing . . . was for the purpose of determining issues of fact concerning, in this case, the [petitioners’] purpose and entitlement to inspect [the corporation’s] corporate records, which was the very basis of their petition. The hearing therefore constituted a trial within the meaning of Trial Rule 43(A).”¹⁴⁷

Therefore, the court ruled, “testimony was required to be taken in open court in order to preserve [the corporation’s] rights to cross-examination and the ability of the fact-finder to observe demeanor and determine credibility.”¹⁴⁸ The court proceeded to analyze the trial court’s finding of a “proper purpose” and concluded that the trial court improperly relied on the affidavit.¹⁴⁹ In reversing the trial court’s ruling, the court of appeals explained “we are reluctant to endorse the trial court’s findings of fact and conclusions thereon as somehow demonstrative of a proper purpose when there was no testimony or properly-admitted evidence establishing it.”¹⁵⁰

V. JOINT VENTURES

In *Lauth Indiana Resort & Casino, LLC v. Lost River Development, LLC*,¹⁵¹ the Indiana Court of Appeals held, as a matter of first impression, as follows:

[I]f a joint venture is formed for the purpose of submitting a proposal or

142. *Id.*

143. *Id.* at 3 (quoting IND. CODE § 23-1-52-2(a), (c) (2007)).

144. *Id.*

145. *Id.*

146. *Id.* at 4 (quoting IND. TRIAL R. 43(A)).

147. *Id.* at 5 (citations omitted).

148. *Id.*

149. *Id.*

150. *Id.* at 6.

151. 889 N.E.2d 915 (Ind. Ct. App. 2008).

similar bid, and the joint venture agreement is silent as to when or under what circumstances the joint venture will end, then the joint venture ends, as a matter of law, when the proposal or bid is rejected.¹⁵²

In March 2004, the Indiana Gaming Commission (IGC) issued a request for proposals (RFP), soliciting proposals from those wishing to develop a casino project in Orange County.¹⁵³ Three groups submitted proposals: Trump Indiana, Orange County Development, and Lost River Development.¹⁵⁴ After Lost River submitted its original proposal, it was contacted by Lauth Indiana Resort & Casino, LLC (Lauth), which expressed a desire to become involved with the Lost River proposal.¹⁵⁵ The Lost River members and Lauth entered into a “Letter Agreement,” providing for the parties’ ownership interests in Lost River. The parties agreed that the Letter Agreement created a “joint venture.”¹⁵⁶ “However, the Letter Agreement was silent as to when, or under what circumstances, the joint venture would end.”¹⁵⁷ Lost River submitted an amended proposal to the IGC.¹⁵⁸ Ultimately, however, the IGC selected the Trump Indiana proposal.¹⁵⁹

The parties were hopeful that Trump Indiana would be unable to meet the financing or other conditions imposed by the IGC.¹⁶⁰ Meanwhile, Lauth began contacting other gaming companies regarding the possibility of teaming up if the IGC rescinded its award to Trump Indiana.¹⁶¹ As expected, Trump Indiana was unable to meet the IGC’s conditions and the IGC issued a second RFP.¹⁶² Lauth submitted a proposal with another company, Cook Group, under the name of Blue Sky Casino, LLC (Blue Sky), in competition with Lost River.¹⁶³ The IGC awarded the development to Blue Sky.¹⁶⁴

Lost River filed suit against Lauth and others, alleging breach of the Letter Agreement, in addition to breach of fiduciary duty claims.¹⁶⁵ Lauth moved for summary judgment, arguing that the Letter Agreement formed a joint venture, which terminated when the IGC chose Trump Indiana’s proposal.¹⁶⁶ The trial court denied Lauth’s summary judgment motion, and Lauth appealed.¹⁶⁷

152. *Id.* at 922-23.

153. *Id.* at 916.

154. *Id.*

155. *Id.* at 917.

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.* at 917-18.

163. *Id.* at 918.

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.* at 919.

As an initial matter, the court in *Lauth* ruled, as a matter of first impression in Indiana, that “a joint venture without a termination date remains in force until its purpose is accomplished or that purpose becomes impracticable.”¹⁶⁸ The court proceeded to evaluate the “purpose” of the Lost River joint venture, starting with the definition of joint venture: “[A] joint venture is an association of two or more parties formed to carry out a single business enterprise for profit. A joint venture is similar to a partnership except that *a joint venture contemplates only a single transaction.*”¹⁶⁹ The court then looked to the express language of the “Letter Agreement,” concluding that “the joint venture contemplated only one proposal and [it] is silent with regard to what would happen if the Lost River proposal was not chosen by the IGC.”¹⁷⁰ The court ruled that “once the IGC rejected the Lost River proposal, the joint venture terminated, and the parties were then free to pursue other opportunities, either with each other or with other parties.”¹⁷¹ As such, the court found, “Lauth did not breach the joint venture agreement or violate any duty owed to the other parties to the joint venture.”¹⁷² The court emphasized that its “holding applies only in cases where, as here, the joint venture agreement is silent as to when the joint venture terminates.”¹⁷³

VI. BUSINESS TORTS AND STATUTORY “CRIMES”

A. *Tortious Interference with Contract*

In *Allison v. Union Hospital, Inc.*,¹⁷⁴ the court evaluated the “justification” element for a tortious interference with a contractual relationship claim.¹⁷⁵ The plaintiffs in *Allison*—Certified Registered Nurse Anesthetists—worked for a hospital providing obstetric anesthesia services.¹⁷⁶ The plaintiffs and hospital were engaged in contract renegotiations while the hospital was attempting to negotiate an agreement with a professional corporation to replace the plaintiffs in providing obstetric anesthesia services for the hospital.¹⁷⁷ The original

168. *Id.* at 920.

169. *Id.* (citations omitted); *see also* Walker v. Martin, 887 N.E.2d 125, 138 (Ind. Ct. App. 2008). The court in *Walker* explained that for a joint venture to exist, “the parties must be bound by an express or implied contract providing for (1) a community of interests, and (2) joint or mutual control, that is, an equal right to direct and govern the undertaking, that binds the parties to such an agreement.” *Id.* “A joint venture agreement must also provide for the sharing of profits.” *Id.*

170. *Lauth*, 889 N.E.2d at 920. The court in *Lauth* recognized that its holding established a “bright-line rule[,]” but believed that approach to be “particularly appropriate for dealing with joint ventures, which by their very nature contemplate only a single transaction.” *Id.* at 922.

171. *Id.* at 921.

172. *Id.*

173. *Id.* at 922.

174. 883 N.E.2d 113 (Ind. Ct. App. 2008).

175. *Id.* at 118-22.

176. *Id.* at 115.

177. *Id.* at 116-17.

agreement with the plaintiffs contained a provision for termination without cause.¹⁷⁸ Before the agreement with the professional corporation was finalized, however, the hospital reached an agreement with the plaintiffs.¹⁷⁹ The new agreement did not contain a termination without cause provision.¹⁸⁰

The hospital informed the professional corporation that the agreement with plaintiffs could, in fact, be terminated without cause subject to ninety days notice.¹⁸¹ After terms were agreed upon with the professional corporation, the hospital provided notice of termination to the plaintiffs.¹⁸² When plaintiffs demanded a copy of their contract, the hospital produced an altered version with a new termination without cause provision.¹⁸³ The hospital and professional corporation finalized their agreement, and plaintiffs sued both of them—alleging breach of contract, tortious interference with a contractual relationship, and other causes of action.¹⁸⁴

To establish a claim of tortious interference with a contractual relationship, a plaintiff must prove the following five elements: “(1) the existence of a valid and enforceable contract; (2) the defendant’s knowledge of the existence of the contract; (3) the defendant’s intentional inducement of the breach of contract; (4) the absence of justification; and (5) damages resulting from the defendant’s wrongful inducement of the breach.”¹⁸⁵ To determine whether a defendant’s conduct is “justified,” the Indiana Supreme Court has suggested that courts look to the factors enumerated in the Restatement (Second) of Torts, which are as follows:

- (a) the nature of the defendant’s conduct;
- (b) the defendant’s motive;
- (c) the interests of the plaintiff with which the defendant’s conduct interferes;
- (d) the interests sought to be advanced by the defendant;
- (e) the social interests in protecting the freedom of action of the defendant and the contractual interests of the plaintiff;
- (f) the proximity or remoteness of the defendant’s conduct to the interference; and
- (g) the relations between the parties.¹⁸⁶

The court in *Allison* explained that “the weight to be given to each consideration may differ from case to case depending on the factual circumstances, but *the*

178. *Id.* at 115.

179. *Id.* at 116.

180. *Id.*

181. *Id.* at 117.

182. *Id.* at 116-17.

183. *Id.* at 116.

184. *Id.* at 117.

185. *Id.* at 118 (citing *Winkler v. V.G. Reed & Sons, Inc.*, 638 N.E.2d 1228, 1235 (Ind. 1994)).

186. *Id.* (quoting *Winkler*, 638 N.E.2d at 1235).

overriding question is whether the defendants' conduct has been fair and reasonable under the circumstances."¹⁸⁷

Regarding the hospital,¹⁸⁸ the court found that there was "*at the least . . . a question of material fact as to whether [the hospital's] actions with respect to the contents of the [agreement with plaintiffs] was justified.*"¹⁸⁹ The court found it significant that the hospital discovered that the contract did not contain a termination without cause provision; the hospital failed to discuss that omission with the plaintiffs; it terminated the contract pursuant to a nonexistent provision; and then it inserted the provision into an altered version, which it delivered to the plaintiffs following termination.¹⁹⁰ The court proceeded to analyze the remaining Restatement factors, concluding that the inquiry regarding "whether [the hospital's] conduct has been fair and reasonable under the circumstances . . . [is] so highly fact sensitive that . . . it is best answered by a factfinder."¹⁹¹

Regarding the professional corporation, the court found that its conduct was justified.¹⁹² The court explained that the professional corporation's conduct was "limited to agreeing to be a replacement provider of [obstetric] anesthesia services."¹⁹³ Further, the hospital told the professional corporation that the plaintiffs' contract was terminable at will.¹⁹⁴ After evaluating the remaining factors enumerated by the Restatement, the court concluded that "[u]nder these circumstances, [the professional corporation's] actions were justified."¹⁹⁵

B. Trade Secrets

In *Bridgestone Americas Holding, Inc. v. Mayberry*,¹⁹⁶ the Indiana Supreme Court held, as a matter of first impression, that the federal courts' long-standing three-part balancing test was "the proper analysis for whether 'good cause' has been shown and whether a protective order should be issued for a trade secret during discovery."¹⁹⁷ Before analyzing and, ultimately, adopting the three-part balancing test for analysis of the protective order issue, the court provided a concise "history" of trade secret protection in Indiana, including the following description:

187. *Id.*

188. The court explained that "[a]lthough it is true that a party to a contract is not subject to liability for tortious interference with its own contract if it acts alone, it may be subject to liability for conspiring with another party to tortiously interfere with the contract." *Id.* (quoting *Winkler*, 638 N.E.2d at 1234 n.7).

189. *Id.* at 120 (emphasis in original).

190. *Id.* at 119-20.

191. *Id.* at 121.

192. *Id.*

193. *Id.* at 122.

194. *Id.*

195. *Id.*

196. 878 N.E.2d 189 (Ind. 2007).

197. *Id.* at 194.

Trade secrets are unique creatures of the law, not property in the ordinary sense, but historically receiving protection as such. Unlike other assets, the value of a trade secret hinges on its secrecy. As more people or organizations learn the secret, the value quickly diminishes. For this reason, owners or inventors go to great lengths to protect their trade secrets from dissemination.

. . . .

This Court has long recognized the importance of protecting trade secrets from inappropriate disclosure. Most trade secret litigation in Indiana has involved allegations of overt misappropriation. Of course, trade secrets may be valuable during the course of litigation not involving misappropriation claims, and there are moments when justice requires disclosure. Still, courts must proceed with care when supervising the discovery of trade secrets, lest the judiciary be used to achieve misappropriation or mere leverage.¹⁹⁸

The court proceeded to adopt the three-part balancing test followed by federal courts,¹⁹⁹ and concluded that the parties seeking disclosure failed to meet their burden for showing necessity.²⁰⁰

C. Indiana's Corrupt Business Influence Act

1. “*Direction*” or “*Control*” of Racketeering Activities Not Required.—In *Keesling v. Beegle*,²⁰¹ the Indiana Supreme Court concluded that Indiana’s Corrupt Business Influence Act—i.e., Indiana’s version of the federal Racketeer Influenced and Corrupt Organizations Act—“imposes RICO liability both on persons at *and below* a racketeering enterprise’s managerial or supervisory level.”²⁰² The plaintiffs in *Keesling* purchased pay telephones and “entered into

198. *Id.* at 192-93 (citations omitted).

199. *Id.* at 193-94. The court described the three-part test as follows:

First, the party opposing discovery must show that the information sought is a “trade secret or other confidential research, development, or commercial information” and that disclosure would be harmful. . . . Then the burden shifts to the party seeking discovery to show that the information is relevant and necessary to bring the matter to trial. If both parties satisfy their burden, the court must weigh the potential harm of disclosure against the need for the information in reaching a decision.

Id. at 193 (quoting FED. R. CIV. PRO. 26(c)(7)) (other citations omitted)).

200. *Id.* at 197. A more thorough discussion of the application of the three-part balancing test as applied to the facts in *Mayberry* is included in this year’s Indiana civil procedure survey. See Daniel K. Burke, *Recent Developments in Indiana Civil Procedure*, 42 IND. L. REV. 879, 882-83 (2009).

201. 880 N.E.2d 1202 (Ind. 2008).

202. *Id.* at 1203 (emphasis added).

service agreements to install, service and maintain the telephones.”²⁰³ The plaintiffs were passive investors in the program.²⁰⁴ The promoters of the program “violated federal securities laws by not registering the pay telephone investment program with the Securities and Exchange Commission.”²⁰⁵

The defendants in *Keesling* included not only the “promoters,” but also the recruited sales representatives and the individuals and entities that had entered agreements with the promoters, “to recruit sales representatives and receive commissions on the sales made by his recruits.”²⁰⁶ The plaintiffs sued the defendants for their respective roles in the pay telephone program, alleging violations of Indiana’s Securities Act, Indiana’s RICO Act, fraud, conversion and theft.²⁰⁷

The plaintiffs contended that these “recruiters” and “recruits” violated the Indiana RICO Act by “conduct[ing] or otherwise participat[ing] in the activities of [an] enterprise through a pattern of racketeering activity.”²⁰⁸ The trial court rejected the contention and granted summary judgment in favor of the defendants, based on the 2000 Indiana Court of Appeals’ decision in *Yoder Grain, Inc. v. Antalis*,²⁰⁹ in which the court of appeals held that “the plaintiff must allege that the defendant ‘participated in the operation or management of the enterprise itself,’ and that the defendant played ‘some part in directing the enterprise’s affairs.’”²¹⁰ According to the court in *Yoder Grain*, “mere participation in the activities of the enterprise is insufficient; the defendant must participate in the operation or management of the enterprise.”²¹¹ The trial court found that the plaintiffs failed to present evidence that the defendants “directed” the activities of the enterprise and, as such, granted summary judgment in the defendants’ favor.²¹²

On transfer, the Indiana Supreme Court abrogated the *Yoder Grain* decision and reversed the trial court’s summary judgment ruling, holding that a defendant need not “direct” or “control” the racketeering activities in order to face liability under Indiana’s RICO Act.²¹³ The Indiana Supreme court explained that “the Legislature intended for the Indiana Act to reach persons below the managerial or supervisory level as well as those who exert control or direction over the affairs of [a racketeering] enterprise, i.e., to reach a racketeering enterprises ‘foot

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.* at 1204.

207. *Id.*

208. *Id.* at 1205-06 (quoting IND. CODE § 35-45-6-2(3) (2008)).

209. 722 N.E.2d 840 (Ind. Ct. App. 2000).

210. *Keesling*, 880 N.E.2d at 1205 (quoting *Yoder Grain*, 722 N.E.2d at 846).

211. *Yoder Grain*, 722 N.E.2d at 846 (quoting *Goren v. New Vision Int’l, Inc.*, 156 F.3d 721, 727 (7th Cir. 1998)).

212. *Keesling*, 880 N.E.2d at 1205.

213. *Id.*

soldiers' as well as its 'generals.'"²¹⁴ In reaching its holding, the court in *Keesling* analyzed the language of the federal RICO statute compared to that of the Indiana Act, finding that the Indiana Act was phrased more "broadly," and it surveyed the laws of other states.²¹⁵ The court stated that "[b]ecause we hold that the level of participation necessary to implicate the Indiana Act need not rise to the level of direction, such a showing was unnecessary and summary judgment was not justified on that basis."²¹⁶

2. *Indiana's RICO Act Not Preempted by IUTSA.*—In *AGS Capital Corp. v. Product Action International, LLC*,²¹⁷ the court held, as a matter of first impression in Indiana, that the Indiana Uniform Trade Secrets Act (IUTSA) does not preempt Indiana's RICO Act.²¹⁸ *AGS* involved claims by Product Action against its former employees, a competing company, and that company's "parent" company (under "alter ego" theory),²¹⁹ alleging, among other things, misappropriation of trade secrets, violation of Indiana's RICO Act. The defendants argued that the IUTSA preempts Product Action under Indiana's RICO Act.²²⁰

In concluding that the IUTSA does not preempt the civil remedy provisions of Indiana's RICO Act, the court in *AGS* explained as follows:

Because the RICO statute was designed to address the more sinister forms of corruption and criminal activity, the preemption provision of IUTSA should not prohibit RICO from fulfilling its purpose where the form of corruption involves the systematic acquisition of economically valuable information through the artifice of competitors' employees in order to gain an unlawful economic advantage in the marketplace. RICO is structured to reach and punish these diabolical operations that are a greater threat to society than random theft.²²¹

The court continued, "In consideration of the purpose and goals of the entire RICO framework, we conclude that the civil remedy portion providing for a private action is a derivative of the criminal law. Thus, this type of action is not preempted by IUTSA."²²² The court was hopeful that its "conclusion will result

214. *Id.* at 1206 (internal quotations omitted).

215. *Id.* at 1205-08.

216. *Id.* at 1208.

217. 884 N.E.2d 294 (Ind. Ct. App. 2008).

218. *Id.* at 308.

219. *See id.* at 311-12 (concluding that the parent and subsidiary companies were "alter egos," premised in large part on the parent's use of a "sister" company to pose as a potential customer of Product Action in order to obtain a price quotation and then provide that information to the subsidiary competitor).

220. *Id.* at 306. The IUTSA provides that it "displaces all conflicting law of this state pertaining to the misappropriation of trade secrets, except contract law and criminal law." *Id.* (quoting IND. CODE § 24-2-3-1(c) (2007)).

221. *Id.* at 308.

222. *Id.*

in a greater disincentive for the commission of the strategic, repetitious theft of trade secrets.”²²³

D. Fraud on a Financial Institution

In *American Heritage Banco, Inc. v. McNaughton*,²²⁴ the court held that a plaintiff alleging “fraud on a financial institution” need not prove the elements of common law fraud.²²⁵ Fraud on a financial institution is defined as follows:

A person who knowingly executes, or attempts to execute, a scheme or artifice . . . to obtain any of the money, funds, credits, assets, securities, or other property owned by or under the custody or control of a state or federally chartered or federally insured financial institution by means of false or fraudulent pretenses, representations, or promises commits a Class C felony.²²⁶

The defendants in *American Heritage* argued that the plaintiff must prove “the elements of common law fraud [including, specifically, “reliance”] in order to prove a violation of this statute.”²²⁷ The court disagreed, explaining that “[i]n Indiana no common-law crimes exist, and the legislature fixes the elements necessary for any statutory crime.”²²⁸ According to the court, “[c]riminal statutes cannot be enlarged by construction, implication, or intendment beyond the fair meaning of the language used.”²²⁹

VII. NON-COMPETITION COVENANTS

A. Public Policy and Geographic Scope

In *Central Indiana Podiatry, P.C. v. Krueger*,²³⁰ a podiatrist had been employed with the plaintiff pursuant to a series of written employment agreements, which were “renewed” every year or two.²³¹ Each agreement

223. *Id.*

224. 879 N.E.2d 1110 (Ind. Ct. App. 2008).

225. *Id.* at 1117-18.

226. *Id.* at 1117 (quoting IND. CODE § 35-43-5-8(a)(2) (2008)).

227. *Id.* at 1117 n.4.

228. *Id.* at 1117 (quoting *Knotts v. State*, 187 N.E.2d 571, 573 (Ind. 1963)).

229. *Id.* The court in *American Heritage* also addressed the plaintiff’s common law fraud claim, addressing the rule that fraud cannot be premised on “representations of future conduct, on broken premises, or on representations of existing intent that are not executed.” *Id.* at 1115. The plaintiff in *American Heritage* based its common law fraud claim, in part, on the defendant’s loan application, which included a statement regarding the “purpose” of the loan. The plaintiff alleged that the stated purpose was not the “true” purpose. The court affirmed the trial court’s dismissal of the claim, explaining that the “stated purpose of the loan is not a statement of past or existing fact.” *Id.* at 1116.

230. 882 N.E.2d 723 (Ind. 2008).

231. *Id.* at 725.

contained non-solicitation and non-competition provisions, with terms of two years from the date of termination and geographic scopes “defined as fourteen listed central Indiana counties, as well as any other county where [plaintiff] maintained an office during the term of the Contract or in any county adjacent to any of the foregoing counties.”²³² Significantly, the podiatrist had not practiced in Hamilton County within 2 years of his termination.²³³

In 2005, the podiatrist was accused of attempting to kiss an office employee at the office.²³⁴ The plaintiff terminated him on July 25, 2005.²³⁵ In September 2005, the podiatrist entered an employment agreement with a competing company in Hamilton County, which was one of the counties specifically listed in the employment agreement with the plaintiff.²³⁶ Further, the podiatrist sent a letter to the plaintiff’s patients, informing them of his new employment.²³⁷ The plaintiff sued for injunctive relief and damages, the trial court found the geographic restriction unenforceable, and denied the injunction.²³⁸ The court of appeals reversed,²³⁹ and the Indiana Supreme Court granted transfer.²⁴⁰

As an initial matter, the court in *Krueger* described the “public policy” concerns implicated by non-competition agreements involving physicians, as follows:

Noncompetition agreements are justified because they protect the investment and goodwill of the employer. In many businesses, the enforceability of a noncompetition agreement affects only the interests of the employee and employer. A noncompetition agreement by a physician involves other considerations as well. Unlike customers of many businesses, patients typically come to the physician’s office and have direct contact with the physician. If an agreement forces a physician to relocate outside the geographic area of the physician’s practice, the patients’ legitimate interest in selecting the physician of their choice is impaired. Moreover, the confidence of a patient in the physician is typically an important factor in the relationship that relocation would displace.²⁴¹

Nevertheless, after reviewing case law and legislation from other states, as well as an ethics opinion from the American Medical Association, the Indiana Supreme Court held that non-competition agreements involving physicians were

232. *Id.* at 725-26 (internal quotations omitted).

233. *Id.* at 730.

234. *Id.* at 725.

235. *Id.*

236. *Id.*

237. *Id.*

238. *Id.*

239. *Id.* (citing *Cent. Ind. Podiatry, P.C. v. Krueger*, 859 N.E.2d 686, 689 (Ind. Ct. App. 2007)).

240. *Id.*

241. *Id.* at 727.

not unenforceable as a matter of public policy.²⁴² The court upheld its 1983 ruling in *Raymundo v. Hammond Clinic Ass'n*,²⁴³ in which it rejected a claim that such covenants were unenforceable on public policy grounds and “adopted a reasonableness standard for physician noncompetition agreements.”²⁴⁴ The court concluded that “[a]ny decision to ban physician noncompetition agreements altogether should be left to the legislature.”²⁴⁵

After finding that the plaintiff had demonstrated that the non-competition agreement “served the legitimate interest of preserving patient relationships developed with [plaintiff’s] resources and to that extent served a legitimate interest of [the plaintiff],”²⁴⁶ the court proceeded to evaluate the reasonableness of the geographic restriction.²⁴⁷ The court explained that “[w]hether a geographic scope is reasonable depends on the interest of the employer that the restriction serves.”²⁴⁸ According to the court, “[a]n employer has invested in creating its physician’s patient relationships only where the physician has practiced.”²⁴⁹ Further, “noncompetition agreements justified by the employer’s development of patient relationships must be limited to the area in which the physician has had patient contact.”²⁵⁰

Because the podiatrist had not used the plaintiff’s resources to establish patient relationships throughout all of the counties either identified by name or description in the agreement, the court in *Krueger* found that the geographic scope was “clearly overbroad.”²⁵¹ However, the court applied the “blue pencil” doctrine in an effort to determine whether enforceable aspects of the non-compete were being violated.²⁵² The court started with the fact that the plaintiff defined its geographic scope in terms of counties, rather than the radius from the locations of the “workplace,” and then considered that the duration of the non-compete was two years.²⁵³ The court explained “when the [two year] period

242. *Id.* at 728.

243. 449 N.E.2d 276 (Ind. 1983).

244. *Krueger*, 882 N.E.2d at 728 (citing *Raymundo*, 449 N.E.2d at 280-81).

245. *Id.*

246. *Id.* at 729.

247. *Id.* The parties had agreed that the two-year duration of the agreement was reasonable.
Id.

248. *Id.* at 730.

249. *Id.*

250. *Id.*

251. *Id.*

252. *Id.* at 730-31. The court described the “blue pencil” doctrine as follows:

If a noncompetition agreement is overbroad and it is feasible to strike the unreasonable portions and leave only reasonable portions, the court may apply the blue pencil doctrine to permit enforcement of the reasonable portions. The blue pencil doctrine permits excising language but not rewriting the agreement.

Id. (internal citations omitted).

253. *Id.* at 730-31.

begins to run varies with when [the podiatrist] left that location.”²⁵⁴ The court found that the plaintiff established only that the podiatrist worked in “three counties—Marion, Tippecanoe and Howard—within the 2-years preceding his termination.”²⁵⁵ Because those counties were specifically identified in the non-compete, the geographic scope was “sustainable as to them.”²⁵⁶

However, the court concluded that the “geographic scope [was] unreasonable to the extent it reache[d] contiguous counties.”²⁵⁷ The court explained that parts of the contiguous counties were too far from the locations at which the podiatrist actually worked.²⁵⁸ In other words, the selection of entire counties as the basis for the geographic restriction rendered the restriction unreasonable, because no evidence was offered to suggest that a “significant contingent of patients” traveled from more remote parts of even the adjacent counties.²⁵⁹ The court, therefore, held that the “contiguous county restriction [was] unreasonable[,]”²⁶⁰ but that the restriction was enforceable as to Marion, Tippecanoe, and Howard counties.²⁶¹

B. “Protectible Interest” in Customer Relationships

In *Gleeson v. Preferred Sourcing, LLC*,²⁶² the court of appeals evaluated whether a plaintiff-employer had a “protectible interest” in its “customer relationships.”²⁶³ In *Gleeson*, the plaintiff employed the defendant as the “sales manager” at its Fort Wayne location.²⁶⁴ The defendant and Preferred entered into a non-competition and confidentiality agreement.²⁶⁵ The defendant was “instrumental in growing [plaintiff’s] Fort Wayne location from a new, start-up facility . . . to one of its more profitable facilities.”²⁶⁶ According to the plaintiff, “customer relationships are ‘key’ to [its] success.”²⁶⁷ The defendant-employee resigned in January 2005.²⁶⁸ In February 2005, the defendant began working for

254. *Id.* at 731.

255. *Id.*

256. *Id.*

257. *Id.*

258. *Id.*

259. *Id.*

260. *Id.*

261. *Id.* The court in *Krueger* affirmed the trial court’s order denying plaintiff’s request for a preliminary injunction, except as to the three Indiana counties for which the non-compete was found enforceable. *Id.* at 734.

262. 883 N.E.2d 164 (Ind. Ct. App. 2008).

263. *Id.* at 172-74.

264. *Id.* at 169.

265. *Id.*

266. *Id.* at 170.

267. *Id.*

268. *Id.*

a competitor, soliciting sales and contacting customers of the plaintiff.²⁶⁹ The plaintiff-employer filed its complaint, seeking damages and a permanent injunction, followed by a motion for preliminary injunction.²⁷⁰ The trial court granted the preliminary injunction and the defendant appealed.²⁷¹

In connection with a dispute regarding the enforceability of a non-competition agreement, the court must “first examine whether the employer has asserted a legitimate interest that may be protected by a covenant.”²⁷² Indiana courts “recognize[] a protectable interest in the good will generated between a customer and a business.”²⁷³ The court in *Gleeson* explained that “[g]ood will includes secret or confidential information such as the names and addresses of customers and the advantage acquired through representative contact.”²⁷⁴ The court explained the rationale for finding a “protectible interest” in customer relationships, as follows:

In industries where personal contact between the employee and the customer is especially important due to the similarity in the product offered by the competitors, the advantage acquired through the employee’s representative contact with the customer is part of the employer’s good will, regardless of whether the employee had access to confidential information.²⁷⁵

The court in *Gleeson* continued, as follows:

If an employee is hired in order to generate such good will, she may be enjoined from subsequently contacting those customers or using that good will to her advantage. Indeed, Indiana courts have held that a salesperson may be restrained from contacting former customers within her previous sales area. There is a personal nature to the relationship between a salesperson and customer, and many times the customer’s only contact with the company is through the salesperson.²⁷⁶

In *Gleeson*, the court concluded that the plaintiff’s “customer relationships and good will [could] be protected by a covenant not to compete[,]”²⁷⁷ because “customer relationships are important in [the] business, which is a ‘people business,’ and . . . [the defendant] ‘was one of [plaintiff’s] most successful sales associates in creating those relationships with [plaintiff’s] customers.’”²⁷⁸

269. *Id.*

270. *Id.*

271. *Id.* at 170-71.

272. *Id.* at 172 (citing *Cent. Ind. Podiatry, P.C. v. Krueger*, 882 N.E.2d 723, 728 (Ind. 2008)).

273. *Id.* at 173 (quoting *Norlund v. Faust*, 675 N.E.2d 1142, 1154 (Ind. Ct. App. 1997)).

274. *Id.*

275. *Id.* (citing *MacGill v. Reid*, 850 N.E.2d 926, 930 (Ind. Ct. App. 2006)).

276. *Id.* (citations omitted).

277. *Id.* at 174.

278. *Id.* at 173-74.

VIII. CONTRACT INTERPRETATION

A. “Contemporaneous Document” Rule

In *Murat v. South Bend Lodge No. 235*,²⁷⁹ the court held that the “contemporaneous document” rule did not apply to the construction of two allegedly contemporaneously executed deeds—one of which contained a specific width to an easement and the other of which did not.²⁸⁰ In *Murat*, the dominant estate brought an action for injunctive relief to prevent the servient estate owner and billboard company from placing a billboard within an easement area.²⁸¹ The subject property had been conveyed subject to a retained easement of unspecified width. The same day as the original conveyance, the retained easement holders conveyed the easement to their daughter and son-in-law, specifying a twenty-three-foot width to the conveyed easement.²⁸² Later, the property owner attempted to place a billboard on a portion of the property.²⁸³ The easement holders sought an injunction preventing placement of the billboard. The trial court denied the injunction, concluding that placement of the billboard along the side of the property would “afford necessary or reasonable ingress and egress.”²⁸⁴ The court declined to read the two deeds together to impose a twenty-three-foot width to the original retained easement.²⁸⁵

In affirming the trial court’s ruling, the court of appeals described the “contemporaneous document” rule as follows: “[I]n the absence of anything to indicate a contrary intention, writings executed at the same time and relating to the same transaction will be construed together in determining the contract. The application of this rule depends on the facts of each particular case.”²⁸⁶

The court in *Murat* explained that “the doctrine should be applied cautiously when the documents involve different parties.”²⁸⁷ The court held that the two deeds should not be read together to impose a deed of specific width on the property owner.²⁸⁸ The original deed conveying the property did not specify a width to the retained easement and the current easement holders pointed to no evidence indicating that the property owner “understood the transaction to involve an easement of a specific width.”²⁸⁹ The court of appeals, therefore, affirmed the trial court’s ruling denying the requested injunction.²⁹⁰

279. 893 N.E.2d 753 (Ind. Ct. App. 2008).

280. *Id.* at 757-58.

281. *Id.* at 755.

282. *Id.* at 754.

283. *Id.* at 755.

284. *See id.* at 756.

285. *Id.* at 757-58.

286. *Id.* (internal quotations omitted).

287. *Id.* at 757.

288. *Id.*

289. *Id.*

290. *Id.* at 757-58.

B. Handwriting Controls Over Print or Typewriting

In *Patel v. United Inns, Inc.*,²⁹¹ the court of appeals applied the rule that “[w]hen construing a contract where there is apparent conflict, handwriting prevails over typewriting.”²⁹² The court explained the rationale for this rule as follows: “Handwritten terms are favored over typewritten terms because there is a presumption that the handwritten terms were more actively negotiated between the parties, and, therefore, that those terms best reflect the parties’ intent.”²⁹³ The court in *Patel* relied on this rule in charging a party to a purchase agreement with an escrow obligation of \$530,000, which had been hand-written onto the contract, as opposed to an escrow obligation of 10% of the purchase price.²⁹⁴ The court recognized that \$530,000 was closer to 25% of the purchase price, but found dispositive that the \$530,000 amount was hand-written into the contract.²⁹⁵ The court held that the party obligated to pay the escrow amount had breached the contract, because he failed to pay the full \$530,000 escrow amount.²⁹⁶

IX. CONTRACT PERFORMANCE AND BREACH

A. Standing to Allege Breach

1. *Third-Party Standing to Argue “First Material Breach.”*—In *Harold McComb & Son, Inc. v. JPMorgan Chase Bank*,²⁹⁷ the court held that a mechanic’s lien holder lacked standing to sue on a mortgagee-bank’s alleged first material breach of a contract between the bank and the mortgagor-borrower.²⁹⁸ The mechanic’s lien holder and bank had filed separate foreclosure actions, which were consolidated.²⁹⁹ The trial court ordered foreclosure of the bank’s mortgages and ordered the sale of the subject property.³⁰⁰ On appeal, the mechanic’s lien holder argued that the trial court erred in foreclosing on the bank’s mortgages, because the bank was in first material breach of the loan agreement between the bank and the mortgagor-borrower.³⁰¹

291. 887 N.E.2d 139 (Ind. Ct. App. 2008).

292. *Id.* at 148 (citing *Scott v. Anderson Newspapers, Inc.*, 477 N.E.2d 553, 562 (Ind. Ct. App. 1985)).

293. *Id.* at 149 n.3.

294. *Id.* at 148.

295. *Id.*

296. *Id.* at 148-49.

297. 892 N.E.2d 1255 (Ind. Ct. App. 2008).

298. *Id.* at 1258.

299. *Id.* at 1256-57.

300. *Id.* at 1257.

301. *Id.* at 1258; *see also* *Wilson v. Lincoln Fed. Sav. Bank*, 790 N.E.2d 1042, 1048 (Ind. Ct. App. 2003) (stating that “where a party is in material breach of a contract, he may not maintain an action against the other party or seek to enforce the contract against the other party if that party later breaches the contract”).

The court in *JPMorgan* rejected the lien holder's argument, concluding that the lien holder had "no legal standing to complain."³⁰² Quoting the United States Supreme Court's decision in *Williams v. Eggleston*,³⁰³ the court in *JPMorgan* explained that "[t]he parties to a contract are the ones to complain of a breach, and if they are satisfied with the disposition which has been made of it and of all claims under it, a third party has no right to insist that it has been broken."³⁰⁴ The court in *JPMorgan* continued, explaining that "only the parties to a contract, those in privity with the parties, and intended third-party beneficiaries under the contract may seek to enforce the contract."³⁰⁵ Concluding that the mechanic's lien holder was none of those, the court affirmed the trial court's ruling that the lien holder lacked standing to assert the bank's alleged breach in opposition to its foreclosure action.³⁰⁶

2. *Members of LLC Lacked Standing to Sue for Damage to LLC.*—In *Vectren Energy Marketing & Service v. Executive Risk Specialty Insurance Co.*,³⁰⁷ the court held that members of a limited liability company lacked standing to sue their (and the LLC's) liability insurance carrier for breach of contract and declaratory relief in connection with the insurer's alleged failure to pay a judgment entered against the LLC and its employees.³⁰⁸ The court reviewed the subject policy and concluded that the members were individual insureds covered by the policy.³⁰⁹ However, the court noted that neither of the members were named defendants in the underlying lawsuit, neither member attempted to intervene in the lawsuit, no judgment was entered against the members, and neither member incurred any defense costs in connection with the lawsuit.³¹⁰

The court in *Vectren* explained that "[t]o establish standing, the plaintiff must demonstrate a personal stake in the outcome of the lawsuit and must show that he or she has sustained or was in immediate danger of sustaining, some direct injury as a result of the conduct at issue."³¹¹ The court acknowledged that the members were covered by the policy and that, as such, the insurer owed them "contractual duties . . . that are separate and distinct from those duties owed to [the LLC]."³¹² However, the court found that the contractual duties at issue in the case were owed only to the LLC. It stated that "[i]t may be that as the two members of [the LLC], the [members] will lose money as an indirect consequence of the judgment, defense expenses, and [the insurer's] refusal to pay. That reality, however, does not mean that they have suffered a "Loss" under

302. *JPMorgan*, 892 N.E.2d at 1258.

303. 170 U.S. 304 (1898).

304. *JPMorgan*, 892 N.E.2d at 1258.

305. *Id.*

306. *Id.*

307. 875 N.E.2d 774 (Ind. Ct. App. 2007).

308. *Id.* at 778-79.

309. *Id.* at 775.

310. *Id.* at 776.

311. *Id.* at 777 (citing *Shourek v. Stirling*, 621 N.E.2d 1107, 1109 (Ind. 1993)).

312. *Id.*

the Policy.”³¹³ The court concluded that the members were “not entitled to attempt to right a wrong allegedly done to a separate and distinct entity.”³¹⁴

B. Third-Party Beneficiaries

In *City of East Chicago v. East Chicago Second Century, Inc.*,³¹⁵ the court discussed third-party beneficiary theory and ruled that two non-profit foundations and a for-profit corporation were intended third-party beneficiaries of two “letter agreements” between the City of East Chicago and a marina partnership, relating to a license to operate a riverboat casino that provided for the payment of a percentage of gross receipts to the foundations and the corporation.³¹⁶ Specifically, the award of a license to the marina partnership was conditioned on the partnership’s agreement to fund local economic development through payment of 3.75% of its gross receipts to the foundations and the corporation.³¹⁷ The license was transferred to Harrah’s, then later, to “Resorts East Chicago.”³¹⁸ The letter agreements were not addressed in the documents transferring the license from Harrah’s to Resorts.³¹⁹

Subsequently, the East Chicago Common Counsel passed an ordinance purporting to redirect the amounts being paid under the letter agreements to the City of East Chicago.³²⁰ The corporation filed suit against Resorts, seeking a declaration that it was a third-party beneficiary entitled to enforce the terms of the letter agreements.³²¹ Resorts filed a third-party complaint against the foundations and the City of East Chicago.³²²

The court in *East Chicago* started with a description of third-party beneficiary law in general:

One who is not a party to a contract may enforce the contract by demonstrating it is a third-party beneficiary. A third-party beneficiary contract exists when (1) the parties intend to benefit a third party; (2) the contract imposes a duty on one of the parties in favor of the third party; and (3) the performance of the terms of the contract renders a direct benefit to the third party intended by the parties to the contract.³²³

313. *Id.* at 778.

314. *Id.* The court in *Vectren* reasoned that if the LLC members had standing in this case, every past, present or future member, officer, director, or employee of an LLC could have a separate justiciable claim against an insurer anytime the LLC or any other insured was denied coverage. *Id.*

315. 878 N.E.2d 358 (Ind. Ct. App. 2007), *trans. granted and rev’d in part and aff’d in part*, 908 N.E.2d 611 (Ind. 2009).

316. *Id.* at 375.

317. *Id.* at 366.

318. *Id.* at 367.

319. *Id.*

320. *Id.*

321. *Id.*

322. *Id.*

323. *Id.* at 374 (internal citations omitted).

The court noted that

[a]mong these three factors, the intent of the contracting parties to benefit the third party is the controlling factor. Such intention may be demonstrated by naming the third party, or by other evidence. The necessary intent is not a desire or purpose to confer a particular benefit upon the third party nor a desire to advance his interest or promote his welfare, but an intent that the promising party or parties shall assume a direct obligation to him.³²⁴

The City of East Chicago argued that the foundations and the corporations were “merely conduits for the citizens of East Chicago, the true intended beneficiaries.”³²⁵ In other words, the City argued that the letters did not evidence an intent to benefit the foundations and the corporation.³²⁶

The court in *East Chicago* disagreed, stating that the “relevant intent” for purposes of third-party beneficiary analysis is “an intent that the promising party or parties shall *assume a direct obligation* to the third party, and not a desire or purpose to *confer a particular benefit* on the third party.”³²⁷ Based on this statement, the court in *City of East Chicago* “declined” to hold that the foundations or the corporation were “conduits.”³²⁸ The court concluded that the foundations and the corporations were third-party beneficiaries of the letter agreements.³²⁹

324. *Id.*

325. *Id.*

326. *Id.*

327. *Id.* (citing Nat’l Bd. of Exam’rs for Osteopathic Physicians & Surgeons, Inc. v. American Osteopathic Physicians & Surgeons Ass’n, 645 N.E.2d 608, 618 (Ind. Ct. App. 1994)).

328. *Id.* at 375.

329. *Id.* The court in *City of East Chicago* also rejected the City’s argument that third-party beneficiaries should not be recognized in a “public contract,” because, according to the City, non-parties should not be allowed to “control a government contract in opposition to the will of the government.” *Id.* (distinguishing *Jenne v. Church & Tower, Inc.*, 814 So. 2d 522 (Fla. Dist. Ct. App. 2002)).

RECENT DEVELOPMENTS IN INDIANA CIVIL PROCEDURE

DANIEL K. BURKE*

During the survey period,¹ the Indiana Supreme Court and the Indiana Court of Appeals rendered several decisions addressing principles of state procedural law and providing helpful interpretations of the Indiana Rules of Trial Procedure.

I. INDIANA SUPREME COURT DECISIONS

A. *Personal Jurisdiction*

In *Stewart v. Vulliet*,² the Indiana Supreme Court interpreted the provisions of the Uniform Child Custody Jurisdiction Law (UCCJL) in conjunction with a custody dispute between the child's mother, a Washington resident, and the child's father, an Indiana resident.³ The court concluded that, although Indiana and Washington had concurrent jurisdiction, it was within the trial court's discretion to dismiss the Indiana action and defer to the Washington court.⁴

Stewart (the father) and Vulliet (the mother) were married in Washington in August 1992 and moved to Indiana in May 2003.⁵ In November 2003, while Vulliet was pregnant with the couple's first child, she filed a petition for dissolution of the couple's marriage and subsequently returned to Washington.⁶ Stewart initiated proceedings in Indiana and obtained several orders pertaining to the child's custody in 2004 and 2005.⁷ In November 2005, Vulliet filed an action in a Washington court, seeking to establish a "parenting plan."⁸ The Washington court initially declined to exercise jurisdiction in light of the pending matter in Indiana.⁹ However, in January 2006, the Washington court granted Vulliet's motion to reconsider, as well as Vulliet's motion for default and entered a temporary parenting plan, which was made permanent in March 2006.¹⁰ In April 2006, Vulliet requested that the Indiana court dismiss the Indiana action,

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1. This Survey discusses select Indiana Supreme Court and Indiana Court of Appeals decisions during the survey period—i.e., from October 1, 2007, through September 30, 2008—as well as amendments to the Indiana Rules of Trial Procedure, which were ordered by the Indiana Supreme Court during the survey period.

2. 888 N.E.2d 761 (Ind. 2008).

3. *Id.* at 764-69.

4. *Id.* at 768-69.

5. *Id.* at 763.

6. *Id.*

7. *See id.*

8. *Id.*

9. *Id.*

10. *Id.*

arguing that Indiana was an inconvenient forum.¹¹ The trial court granted Vulliet's motion;¹² however, the trial court premised its decision on its conclusion that Washington was better situated to manage the custody issues.¹³

The Indiana Supreme Court granted transfer and began its analysis with a discussion of the UCCJL, which is codified at the Indiana Code section 31-17-3-3 (2008).¹⁴ The court discussed the four factors a court must consider when conferring jurisdiction in a child custody matter and concluded that Indiana Code section 31-17-3-3(A)(4), which confers jurisdiction upon Indiana if the child has no home state and jurisdiction in Indiana is in the child's best interest, controlled.¹⁵ At the time Vulliet filed her petition for dissolution, the child had not yet been born and, therefore, had no home state.¹⁶ The court reasoned that, upon the child's birth, Washington became her home state, such that Indiana and Washington had concurrent jurisdiction with respect to child custody issues.¹⁷ The court further noted that, because custody proceedings were already pending in Indiana, Washington would not be able to exercise jurisdiction, unless the Indiana court first terminated or stayed the Indiana proceedings.¹⁸ However, the court concluded that the trial court properly exercised its discretion in determining that Washington was better suited to manage issues pertaining to the child's custody and visitation and dismissed the Indiana action.¹⁹

B. Preferred Venue

In *Randolph County v. Chamness*,²⁰ the court resolved a unique venue dispute, arising from an auto accident that occurred in two different counties.²¹

Chamness was a passenger in a vehicle traveling along Randolph County Road 300 North toward the Delaware County line.²² As the vehicle entered a curve, the driver lost control. The vehicle left the road, overturned, ejected Chamness and caused her serious injuries when she landed across the county line in Delaware County.²³ Chamness, a Randolph County resident, filed suit against Randolph County in Delaware Circuit Court, alleging that Randolph County had negligently constructed, maintained and supervised the portion of the roadway

11. *Id.*

12. *Id.*

13. *Id.* at 763-64.

14. *Id.* at 764-69.

15. *Id.* at 764-66.

16. *Id.* at 765.

17. *Id.* at 765-66.

18. *Id.* at 766.

19. *Id.* at 766-68.

20. 879 N.E.2d 555 (Ind. 2008).

21. *Id.* at 558.

22. *Id.* at 556.

23. *Id.*

on which the accident occurred.²⁴ Randolph County filed a motion for change of venue, arguing that Randolph County is the only preferred venue under Rule 75.²⁵ Following a hearing, the trial court denied Randolph County’s motion.²⁶ The court of appeals reversed the trial court’s decision, concluding that Rule 75(A)(3) provides that preferred venue is the county where the tortious conduct, i.e., the alleged negligence, occurred.²⁷

The Indiana Supreme Court granted transfer and affirmed the trial court.²⁸ The court began its analysis with the general proposition that “any case may be venued in any county in the state, subject to the right of an objecting party to request that the case be transferred to a preferred venue listed in Rule 75(A).”²⁹ The court further noted that there are often more than one preferred venues for any given case, and, if an action is filed in a preferred venue, the trial court may not grant a change of venue.³⁰ This case, the court noted, involved consideration of two preferred venue provisions in Rule 75(A).³¹ Rule 75(A)(5) places preferred venue in a county where one or more individual plaintiffs reside, if a government organization is a defendant, or where the principal of a governmental organization is located.³² Both the plaintiff and defendant governmental entity resided in Randolph County.³³ However, Rule 7(A)(3) provides for preferred venue in a county where a motor vehicle accident occurred.³⁴ The court noted that the determinative issue is whether Delaware County is a preferred venue as the county in which the accident occurred.³⁵

Citing the “spirit of convenience underlying the venue rules,” the court concluded that Delaware County would be just as convenient a forum as Randolph County.³⁶ Further, aspects of the accident occurred in both Randolph County and Delaware County.³⁷ Accordingly, the court concluded that preferred venue would exist in either county, noting that, “if a car runs off the road in one county and lands in another, an injured plaintiff may file suit in either county.”³⁸

24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.* at 556-57.
31. *Id.* at 557.
32. IND. TRIAL R. 75(A)(5); *see also Chamness*, 879 N.E.2d at 557.
33. *Chamness*, 879 N.E.2d at 557.
34. IND. TRIAL R. 75(A)(3); *see also Chamness*, 879 N.E.2d at 557.
35. *Chamness*, 879 N.E.2d at 557.
36. *Id.* at 558.
37. *Id.*
38. *Id.*

C. Discovery

In *Bridgestone Americas Holding, Inc. v. Mayberry*,³⁹ the court, in a matter of first impression in Indiana, adopted a three-part analysis to determine whether to protect trade secret information from discovery.⁴⁰

Following a fatal car accident, the plaintiff brought a product liability action against Bridgestone, alleging that the accident resulted from tire tread separation.⁴¹ During discovery, the plaintiff requested the “formula for the steel belt skim stock” for the tire involved in the accident.⁴² Bridgestone objected and moved for a protective order, claiming that this information constituted a trade secret.⁴³ The trial court declined to bar discovery of this formula and ordered that it be produced subject to certain restrictions as to its use and dissemination.⁴⁴

The Indiana Supreme Court granted transfer and formally adopted a three-part test to determine whether a party’s trade secret information could be protected from discovery.⁴⁵ The court reasoned that the Indiana legislature’s adoption of the Uniform Trade Secret’s Act shows a legislative “intent to apply trade secret law uniformly with other jurisdictions.”⁴⁶ In light of this legislative intent and the numerous other jurisdictions, including the federal courts, already employing it, the court formally adopted the three-part balancing test to determine whether trade secret information should be protected from discovery.⁴⁷

First, the party seeking to protect trade secret information bears the burden of demonstrating that the information is a trade secret, as defined by the Indiana Trade Secret’s Act.⁴⁸ The court concluded that Bridgestone had carried its burden and established that the formula in question constituted a trade secret.⁴⁹

Second, if the producing party establishes that the information at issue is a trade secret, the burden shifts to the requesting party to demonstrate that the information is both relevant and necessary.⁵⁰ To establish that the information is necessary, the requesting party bears the burden of establishing that “without discovery of the particular trade secret, the discovering party would be unable to present its case ‘to the point that an unjust result is a real, rather than merely possible, threat.’”⁵¹

Finally, if both parties have met their respective burdens, the court must

39. 878 N.E.2d 189 (Ind. 2008).

40. *Id.* at 194.

41. *Id.* at 190-91.

42. *Id.* at 191.

43. *Id.*

44. *Id.*

45. *Id.* at 191, 194.

46. *Id.* at 194.

47. *Id.*

48. *Id.*

49. *Id.* at 195.

50. *Id.*

51. *Id.* at 196 (quoting *In re Bridgestone/Firestone, Inc.*, 106 S.W.2d 730, 733 (Tex. 2003)).

balance the harm caused by disclosure of the trade secret against the requesting party's need for the information.⁵² Because the court concluded that the plaintiff had not met its burden of demonstrating that discovery of the trade secret information was necessary, however, the final step in the analysis was not necessary in this case.⁵³ Accordingly, the court reversed the trial court's protective order requiring that Bridgestone disclose its trade secret.⁵⁴

D. Summary Judgment

1. *Determination of Reasonable Care as a Matter of Law.*—In *Lean v. Reed*,⁵⁵ the court concluded that, in certain circumstances, the reasonableness of a party's conduct can be determined as a matter of law for purposes of summary judgment.⁵⁶ The plaintiffs, shareholders in a corporation, brought an action against the corporation's officers and directors, including Lean, alleging various violations of the Indiana Security Law.⁵⁷ The plaintiffs also sought to impose individual liability upon Lean in accordance with section 19(d) of the Act.⁵⁸ The plaintiffs moved for partial summary judgment as to liability only, with damages to be determined at trial.⁵⁹ Lean opposed summary judgment, arguing, in part, that he exercised reasonable care and, therefore, could not be liable under section 19(d).⁶⁰ The trial court rejected Lean's argument and entered partial summary judgment in favor of the plaintiffs.⁶¹

The Indiana Supreme Court granted transfer and affirmed the trial court.⁶² The court began its analysis by agreeing with Lean that "summary judgment is rarely appropriate as to a director's reasonable care."⁶³ The court further noted that reasonable care is ordinarily a fact issue, preventing summary judgment.⁶⁴ However, the court stated that "in extreme cases, conduct might be reasonable or unreasonable as a matter of law."⁶⁵ According to the undisputed facts in the record, Lean simply assumed the challenged transactions complied with applicable law;⁶⁶ however, he did not consult with anyone or review any

52. *Id.*

53. *Id.* at 197.

54. *Id.*

55. 876 N.E.2d 1104 (Ind. 2007).

56. *Id.* at 1113.

57. *Id.* at 1106.

58. *Id.*

59. *Id.*

60. *See id.*

61. *Id.*

62. *Id.* at 1107, 1114.

63. *Id.* at 1113.

64. *Id.*

65. *Id.*

66. *Id.* at 1113-14.

documents in reaching his conclusion.⁶⁷ The court concluded: “[B]lind assumption that all is well leaves the investing public in the same position as if there were no directors of the corporation. The statute places liability on the directors and officers to get their attention. If they respond with inattention, they proceed at their own risk.”⁶⁸

2. *Designation of Summary Judgment Evidence.*—In *Filip v. Block*,⁶⁹ the Indiana Supreme Court clarified requirements for designation of evidence in support of a motion for summary judgment.⁷⁰

The Filips filed suit against their insurance agent for failing to secure adequate insurance coverage, resulting in substantial uncovered loss following a fire at the Filips’ property.⁷¹ The insurance agent responded with a motion for summary judgment, in which she provided general designations of evidence in the motion and more specific designations of evidence in the memorandum in support of the summary judgment motion.⁷² The Filips failed to file a response or designate evidence within the time limits specified in Rule 56(C).⁷³ The trial court limited the Filips’ evidence in opposition to summary judgment to the specific designations contained in the insurance agent’s summary judgment memorandum.⁷⁴ The trial court granted the summary judgment motion.⁷⁵

The Indiana Court of Appeals reversed, concluding that the Filips could rely on the designations of evidence contained in the insurance agent’s motion, not just the specific lines and paragraphs designated in the summary judgment memorandum.⁷⁶

The Indiana Supreme Court granted transfer and affirmed the trial court’s grant of summary judgment.⁷⁷ First, the court noted that Rule 56(C) does not require any particular form of designation but that it does require specificity.⁷⁸ Further, the court observed that the parties are free to choose the placement of the designation of evidence, e.g., in a summary judgment motion, in a memorandum in support of summary judgment or in a separate filing.⁷⁹ The court concluded, however, that a party’s designation of evidence must be contained in a single location.⁸⁰ In this case, the insurance agent’s designation appeared in both the

67. *Id.*

68. *Id.* at 1114.

69. 879 N.E.2d 1076 (Ind. 2008).

70. *Id.* at 1081-82.

71. *Id.* at 1079.

72. *Id.*

73. *Id.*

74. *Id.* at 1079-80.

75. *Id.* at 1080.

76. *Id.*

77. *Id.* at 1080, 1086.

78. *Id.* at 1081.

79. *Id.*

80. *Id.*

summary judgment motion and supporting memorandum.⁸¹ Moreover, if a party designates both specific lines or test and also designates a more general identification of the document containing specific lines or test, the court may limit the party to the more specific designations.⁸² However, the court concluded that a party opposing summary judgment may rely on any of the movant's designations of evidence, even if the evidence is inconsistently designated in separate places.⁸³ Accordingly, the Indiana Supreme Court affirmed the court of appeal's decision and reversed the trial court's grant of summary judgment.⁸⁴

E. New Trial

1. *Motion for Judgment on the Evidence Distinguished from Motion to Correct Error.*—In *Ho v. Frye*,⁸⁵ the court clarified the distinction between the proper remedy for a motion for judgment on the evidence and a motion to correct error.⁸⁶

The plaintiff filed a medical negligence action alleging that she sustained damages as a result of her surgeon's failure to remove sponges following an abdominal surgery.⁸⁷ The plaintiff filed a motion for partial summary judgment as to liability, with damages to be determined at trial.⁸⁸ The trial court denied the motion, and the jury returned a verdict in favor of the surgeon.⁸⁹ Following the trial, the plaintiff filed a Rule 50 motion for judgment on the evidence and, shortly thereafter, filed a motion to correct error pursuant to Rule 59(J).⁹⁰ The trial court ordered a new trial as to both liability and damages but made no special findings of fact and offered no explanation as to the basis for its order.⁹¹

The Indiana Supreme Court granted transfer and sought to clarify the situation.⁹² The court noted that, under Rule 50(C), the trial court may grant a new trial as to any or all of the issues and need not enter supporting findings.⁹³ The court reasoned that, in ruling on a Rule 50(C) motion, the court must consider only the evidence most favorable to the non-moving party and may grant relief only if there is no evidence with respect to an essential element of the claim.⁹⁴ However, in ordering a new trial under Rule 59(J), the trial court acts

81. *See id.* at 1079.

82. *Id.* at 1081.

83. *Id.*

84. *Id.* at 1086.

85. 880 N.E.2d 1192 (Ind. 2008).

86. *Id.* at 1195-97.

87. *Id.* at 1194.

88. *Id.* at 1195.

89. *Id.*

90. *Id.*

91. *Id.* at 1195.

92. *Id.* at 1194.

93. *Id.* at 1195.

94. *Id.* at 1196.

as the “thirteenth juror” and must “sift and weigh the evidence and judge witness credibility.”⁹⁵ Accordingly, a new trial under Rule 50(C) is only appropriate “when there is a glaring absence of critical evidence or reasonable inferences—a critical failure of proof.”⁹⁶ However, in ordering a new trial under Rule 59(J), the trial court must determine that the jury’s verdict is contrary to the weight of the evidence, which requires “careful sifting and evaluation.”⁹⁷ Rule 59(J) also requires that the court enter special findings.⁹⁸ The proper remedy for the trial court’s failure to do so is reinstatement of the verdict.⁹⁹

Not only did the trial court’s order not include special findings, but it also did not specify whether the new trial was ordered pursuant to Rule 50 or Rule 59.¹⁰⁰ However, the court concluded that, because the trial court’s order granted a new trial as to both liability and damages, the trial court must have intended to grant the Rule 59(J) motion.¹⁰¹ Nevertheless, because the trial court failed to enter specific findings in conjunction with its granting of a Rule 59(J) motion, its order for a new trial was reversed and the verdict reinstated.¹⁰²

2. *Newly Discovered Evidence.*—In *Speedway Superamerica, LLC v. Holmes*,¹⁰³ the Indiana Supreme Court held that a new trial was appropriate where evidence was disclosed for the first time on the first day of trial.¹⁰⁴

The plaintiff, Holmes, filed a premises liability action against Speedway, alleging that he slipped and fell on spilled diesel fuel at a Speedway’s truck stop.¹⁰⁵ Approximately ten days before trial, Holmes’ counsel learned that Holmes still had possession of the jeans and boots that he was wearing at the time of the accident.¹⁰⁶ Holmes’ counsel instructed Holmes to bring these items to the courthouse for trial but did not advise Speedway’s counsel regarding the existence of this evidence until the morning of the first day of trial.¹⁰⁷ At trial, Holmes attempted to introduce the jeans, which had a dark spot that could be diesel fuel, into evidence.¹⁰⁸ Speedway’s counsel objected because there was no way to know whether the dark stain on the jeans was, in fact, diesel fuel.¹⁰⁹ The trial court admitted the jeans into evidence but instructed that there would be no

95. *Id.* (quoting *Keith v. Mendus*, 661 N.E.2d 26, 31 (Ind. Ct. App. 1996)).

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.* at 1197.

101. *Id.*

102. *Id.*

103. 885 N.E.2d 1265 (Ind. 2008).

104. *Id.* at 1273-74.

105. *Id.* at 1266-67.

106. *Id.* at 1267.

107. *Id.*

108. *Id.*

109. *Id.* at 1267-68.

testimony or inference that the dark stain was in fact diesel fuel.¹¹⁰ The jury returned a verdict favorable to Holmes.¹¹¹

Following trial, Speedway filed a motion to correct error and for relief from judgment under Rules 59 and 60, arguing that testing of the jeans would reveal new evidence that could not be discovered and produced by Speedway in time for trial, i.e., whether the stain was actually diesel fuel and, if so, whether it was Speedway's diesel fuel.¹¹² The trial court granted Speedway's motion to test the jeans and, following testing, conducted a hearing.¹¹³ During the hearing, Speedway's chemist testified that the stain on the jeans was not diesel fuel, that the jeans had been laundered with detergent and, upon examination of the tags, the jeans had not been manufactured as of the date of Holmes' accident and, therefore, could not have been worn on that date.¹¹⁴ Nevertheless, the trial court denied Speedway's motion for a new trial.¹¹⁵

The Indiana Supreme Court granted transfer and reversed the trial court's denial of Speedway's motion for new trial.¹¹⁶ First, the court listed the requirements for a new trial based on newly discovered evidence.¹¹⁷ Specifically, the court concluded that a new trial would be warranted if:

(1) the evidence has been discovered since the trial; (2) it is material and relevant; (3) it is not cumulative; (4) it is not merely impeaching; (5) it is not privileged or incompetent; (6) due diligence was used to discover it in time for trial; (7) the evidence is worthy of credit; (8) it can be produced upon a retrial of the case; and (9) it will probably produce a different result at trial.¹¹⁸

In the court's estimation, the only factor at issue was whether Speedway had exercised sufficient diligence in discovering the jeans in time for trial.¹¹⁹ Holmes argued that Speedway should have requested production of the jeans during discovery and performed necessary testing before trial or that Speedway should have requested a continuance of the trial to test the jeans.¹²⁰ The court rejected these argument in light of Holmes' conduct in concealing the existence of the jeans until the morning of the first day of trial.¹²¹ Accordingly, the court concluded that Speedway could not have discovered the existence of the jeans and conducted necessary testing even in the exercise of due diligence and,

110. *Id.* at 1268.

111. *Id.* at 1269.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.* at 1270, 1274.

117. *Id.* at 1271 (quoting *Carter v. State*, 738 N.E.2d 668, 671 (Ind. 2000)).

118. *Id.* (quoting *Carter*, 738 N.E.2d at 671).

119. *Id.* at 1272.

120. *Id.* at 1272-73.

121. *Id.* at 1272-74.

therefore, concluded that a new trial was appropriate.¹²²

II. INDIANA COURT OF APPEALS DECISIONS

A. Standing

In *Vectren Energy Marketing & Service, Inc. v. Executive Risk Specialty Ins. Co.*,¹²³ the court affirmed the trial court's dismissal of the plaintiff's action for lack of standing.¹²⁴ The plaintiffs, the two members of a limited liability company (LLC), brought suit against the LLC's insurer, alleging breach of contractual obligations owed by the insurer to the LLC.¹²⁵ However, the court concluded that, while the plaintiffs were covered by the LLC's insurance policy, they lacked standing to assert the LLC's contractual claims against the insurer.¹²⁶

B. Subject Matter Jurisdiction

In *H.D. v. BHC Meadows Hospital, Inc.*,¹²⁷ the court reversed the trial court's dismissal of the Dosses' claim for lack of subject matter jurisdiction.¹²⁸

Upon finding what appeared to be a suicide note written by their daughter, the Dosses referred the matter to a school counselor.¹²⁹ The school counselor, in turn, referred the Dosses to the defendant adolescent psychiatric hospital.¹³⁰ The psychiatric nurse who met with the Dosses recommended that their daughter be admitted for treatment.¹³¹ The Dosses were reluctant, expressing concerns about how hospitalization might affect their daughter's reputation at school.¹³² The nurse assured them that their daughter's treatment would be kept confidential and further agreed that there would no communications with anyone at the school regarding their daughter's hospitalization or treatment.¹³³

However, the therapist treating the Dosses' daughter sent a letter by facsimile to the school therapist, thanking him for the referral and updating him as to the progress of treatment.¹³⁴ The therapist did not, however, send the fax to the counselor's direct fax line.¹³⁵ Rather, the fax was transmitted to the school's

122. *Id.* at 1274.

123. 875 N.E.2d 774 (Ind. Ct. App. 2007).

124. *Id.* at 779.

125. *Id.* at 776-77.

126. *Id.* at 777-79.

127. 884 N.E.2d 849 (Ind. Ct. App.), *trans. denied*, 898 N.E.2d 1226 (Ind. 2008).

128. *Id.* at 856.

129. *Id.* at 851.

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.* at 851-52.

135. *Id.* at 852.

main fax line, where it was viewed by a number of faculty members.¹³⁶ The therapist also sent a second letter via fax to the school's main fax line.¹³⁷ The second letter contained a satisfaction survey relating to the Dosses' daughter's treatment and hospitalization.¹³⁸

The Dosses filed suit against the hospital, alleging invasion of privacy, negligent infliction of emotional distress, intentional/reckless infliction of emotional distress and violations of confidentiality obligations.¹³⁹ The hospital responded with a motion to dismiss, arguing that the Dosses' claims were subject to the Indiana Medical Malpractice Act, which requires that the claims first be submitted to a medical review panel prior to filing an action in an Indiana court.¹⁴⁰ The trial court granted the motion, and the Dosses appealed.¹⁴¹

The court acknowledged that a medical malpractice action must first be submitted to a medical review board before it can be filed in court.¹⁴² In other words, the court observed the Medical Malpractice Act grants subject matter jurisdiction to the medical review board first, and then to the trial court.¹⁴³ However, the court concluded that the therapist's transmission of information did not constitute "health care or professional services provided to a patient," so the communications did not constitute medical malpractice.¹⁴⁴ Therefore, because this was not a medical practice action, the Dosses were not required to first submit their claims to a medical review board, the trial court erred in dismissing the Dosses' claim for lack of subject matter jurisdiction.¹⁴⁵

C. Limitations

1. *Limitations in a Legal Malpractice Action.*—In *Ickes v. Waters*,¹⁴⁶ the court affirmed the trial court's entry of summary judgment where the applicable statute of limitations had run with respect to the plaintiff's legal malpractice action.¹⁴⁷

The defendant attorney assisted the plaintiff and her husband in transferring their assets into a trust, establishing the plaintiff's husband as the trustee and vesting him with sole power to amend or revoke the trust during his lifetime.¹⁴⁸

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.* at 853.

143. *Id.*

144. *Id.* at 854.

145. *Id.* at 856.

146. 879 N.E.2d 1105 (Ind. Ct. App.), *clarified by reh'g and reaff'd*, 886 N.E.2d 643 (Ind. Ct. App.), *trans. denied*, 898 N.E.2d 1222 (Ind. 2008).

147. *Id.* at 1110.

148. *Id.* at 1107.

Upon his death, the trust would become irrevocable.¹⁴⁹ On May 7, 2001, the plaintiff and her husband met with the defendant and formally transferred their assets into the trust.¹⁵⁰ Following her husband's death on July 25, 2003, the plaintiff and her husband's daughter, the new trustee, disagreed regarding the plaintiff's income under the trust.¹⁵¹ The plaintiff filed a legal malpractice action against the defendant, who responded with a summary judgment motion based on the running of the applicable limitations.¹⁵²

On appeal, the court concluded that the applicable limitations period begins to run when the plaintiff knows of, or in the exercise of reasonable diligence could have discovered, the wrongful conduct.¹⁵³ Plaintiff argued that she became aware of the defendant's alleged negligence upon the death of her husband.¹⁵⁴ However, the court concluded that the limitations period begins to run when the tortious conduct occurs, not when damages are realized.¹⁵⁵ The court determined that the defendant's negligence, if any, occurred when the plaintiff and her husband transferred their assets into the trust, and limitations began to run from that date.¹⁵⁶ Because this transfer took place more than two years before the plaintiff filed her legal malpractice action, the claim was barred by limitations, and the court affirmed the trial court's entry of summary judgment in favor of the defendant attorney.¹⁵⁷

2. *Continuing Wrong and Fraudulent Concealment.*—In *Johnson v. Blackwell*,¹⁵⁸ the court affirmed the trial court's dismissal of the plaintiff's claims for civil rights violations, false imprisonment/false arrest, wrongful infliction of emotional distress and invasion of privacy by intrusion on limitations grounds.¹⁵⁹

The plaintiff's claims arose from his arrest and the search of his home on February 27, 2003.¹⁶⁰ Responding to an anonymous tip, police met with the plaintiff at his home and requested his permission to search the premises.¹⁶¹ Eventually, the plaintiff permitted the search and the police officers discovered crack cocaine.¹⁶² The police arrested the plaintiff and subsequently charged him with possession with intent to distribute crack cocaine.¹⁶³

Following the reversal of his conviction and dismissal of the indictment

149. *Id.*

150. *Id.*

151. *Id.* at 1107-08.

152. *Id.* at 1108.

153. *Id.*

154. *Id.* at 1107-08.

155. *Id.* at 1108-09.

156. *Id.* at 1109.

157. *Id.*

158. 885 N.E.2d 25 (Ind. Ct. App. 2008).

159. *Id.* at 33.

160. *Id.* at 27-28.

161. *Id.* at 28.

162. *Id.*

163. *Id.*

against him in 2006, the plaintiff filed a complaint asserting claims for civil rights violations, false imprisonment/false arrest, wrongful infliction of emotional distress and invasion of privacy by intrusion.¹⁶⁴

The court concluded that each of these claims, except for the civil rights claim, accrued on February 27, 2003, when the plaintiff was arrested and his home searched.¹⁶⁵ The court further concluded that the plaintiff's civil rights claim accrued for limitations purposes in March 2003, when the plaintiff was bound over for trial.¹⁶⁶ Because each of these claims was subject to the two-year limitations period for actions involving injury to person, the court held that the plaintiff's claims were time-barred.¹⁶⁷

The court rejected the plaintiff's argument under the continuing wrong doctrine, which tolls the running of limitations until the end of a continuing wrongful act.¹⁶⁸ The court noted that the continuing wrong doctrine does not apply where the plaintiff is aware of facts that should lead to the discovery of his cause of action, even if the defendant continues its wrongful conduct beyond that point.¹⁶⁹ Because the plaintiff was immediately aware of the acts upon which his claims were premised, i.e., his arrest and the search of his home, the continuing wrong doctrine did not apply.¹⁷⁰

The court also rejected the plaintiff's fraudulent concealment argument.¹⁷¹ Fraudulent concealment will toll the running of limitations if the liable party intentionally conceals the operative facts from the plaintiff.¹⁷² Again, however, because the plaintiff was fully aware of the facts upon which his claims were based as of the date he was arrested and his home was searched, there were no facts concealed from him.¹⁷³ Accordingly, the doctrine of fraudulent concealment did not operate to toll the running of the limitations period and the plaintiff's claims were time barred.¹⁷⁴

D. Service of Process

In *Goodson v. Carlson*,¹⁷⁵ the court reversed the trial court's motion to set aside a default judgment where service of process on the defendant was ineffective.¹⁷⁶

164. *Id.* at 29.

165. *Id.* at 30.

166. *Id.* at 31.

167. *Id.*

168. *Id.* at 32.

169. *Id.*

170. *Id.* at 31-32.

171. *Id.* at 32.

172. *Id.*

173. *Id.*

174. *Id.*

175. 888 N.E.2d 217 (Ind. Ct. App. 2008).

176. *Id.* at 222.

Following an automobile accident, Carlson filed suit against Goodson, alleging that he was negligent in the operation of his vehicle.¹⁷⁷ Carlson first sought to have Goodson personally served with process; however, because Carlson failed to provide Goodson's specific apartment number, the sheriff was unable to effect service.¹⁷⁸ Carlson took no further action for several months until requesting leave to file an alias summons in response to the trial court's notice of intent to dismiss for failure to prosecute.¹⁷⁹ Carlson continued to take no action until nearly a year later when Carlson requested permission from the court to serve Goodson with process by publication in accordance with Trial Rule 4.13(a).¹⁸⁰

On appeal, the court concluded that Carlson was not sufficiently diligent in attempting to ascertain Goodson's address before seeking leave to serve Goodson by publication.¹⁸¹ Carlson had merely attempted to obtain Goodson's address through Bureau of Motor Vehicles records.¹⁸² However, they did not attempt to get more accurate or specific information through Goodson's auto insurer or through the manager of the apartment building where Goodson resided.¹⁸³

E. Venue

In *Johnson County Rural Electric Membership Corp. v. South Central Indiana Rural Electric Membership Corp.*,¹⁸⁴ the court reversed the trial court's denial of the defendant's motion for automatic change of judge.¹⁸⁵

The plaintiff filed a complaint seeking a preliminary and permanent injunction preventing the defendant from removing the plaintiff's electric meters from the plaintiff's customer's homes.¹⁸⁶ Before the defendant filed an answer to the plaintiff's complaint, the trial court scheduled a preliminary injunction hearing.¹⁸⁷ Following the hearing, the trial court entered a preliminary injunction in favor of the plaintiff and scheduled a pretrial conference.¹⁸⁸ One day after the trial court entered the preliminary injunction, the defendant filed a motion for automatic change of judge pursuant to Rule 76(B).¹⁸⁹ The trial court denied the motion, and the defendant appealed.¹⁹⁰

177. *Id.* at 218.

178. *Id.* at 221.

179. *Id.*

180. *Id.*

181. *Id.* at 222.

182. *Id.* at 221-22.

183. *Id.* at 222.

184. 883 N.E.2d 141 (Ind. Ct. App. 2008).

185. *Id.* at 146.

186. *Id.* at 142.

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*

On appeal, the court determined that the defendant's motion for automatic change of judge was timely under Rule 76(C) and, therefore, reversed the trial court's denial.¹⁹¹ The court embraced the defendant's argument that, because the issues had not yet closed on the merits, the motion for automatic change of judge was timely under Rule 76(C).¹⁹² In reaching this conclusion, the court rejected the plaintiff's argument under Rule 76(C)(5), which provides that a party waives its right to an automatic change of judge if it does not make its request within three days of the trial court's order setting a trial date.¹⁹³ The court concluded that the trial court's order scheduling the preliminary injunction hearing did not constitute an order setting the trial; therefore, Rule 76(C)(5) did not apply, and the defendant did not waive its right to an automatic change of judge.¹⁹⁴

F. Pleadings

1. *Leave to Amend*.—In *Turner v. Franklin County Four Wheelers, Inc.*,¹⁹⁵ the court reversed the trial court's denial of the plaintiff's motion for leave to amend her complaint.¹⁹⁶

Due to either human error or a computer malfunction, the plaintiff's complaint did not include her attorney's signature.¹⁹⁷ The defendant filed a motion to strike the complaint in accordance with Rule 11(A) because it was not signed.¹⁹⁸ The plaintiff responded by moving for leave to amend the complaint.¹⁹⁹ However, because the limitations period had run by that time, the defendant moved to dismiss the complaint.²⁰⁰ Following a hearing, the trial court denied the plaintiff's motion for leave to amend and granted the defendant's motion to dismiss the complaint.²⁰¹

On appeal, the court noted that procedural rules are “extremely important,” but are “merely a means for achieving the ultimate end of an orderly and speedy justice.”²⁰² Moreover, the court observed that it should “never ignore the plain fact that the consequence of strict adherence to procedural rules may occasionally defeat rather than promote the ends of justice.”²⁰³ Accordingly, the court held that, because there was no undue delay, bad faith or dilatory motive by plaintiff and no repeated failure to cure pleading deficiencies, the trial court abused its

191. *Id.* at 143.

192. *Id.*

193. *Id.*

194. *Id.* at 144.

195. 889 N.E.2d 903 (Ind. Ct. App. 2008).

196. *Id.* at 908.

197. *Id.* at 904.

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.* at 905.

202. *Id.* (citations omitted).

203. *Id.* (quoting *Softwater Utils., Inc. v. Le Fevre*, 301 N.E.2d 745, 750 (Ind. 1973)).

discretion in refusing to allow the plaintiff to amend her complaint.²⁰⁴ The court remanded the matter to the trial court with instructions to permit the plaintiff to amend her complaint and that the amendment would relate back to the date of the original filing, thereby avoiding a limitations issue.²⁰⁵

2. *Amendment to Conform to Evidence.*—In *Bailey v. State Farm Mutual Automobile Insurance Co.*,²⁰⁶ the court affirmed the trial court's denial of the plaintiff's motion for leave to amend his complaint to conform with the evidence presented at trial.²⁰⁷

The court began its analysis by noting that the trial court should freely allow the parties to amend pleadings.²⁰⁸ However, in ruling on a motion for leave to amend pleadings to conform with the evidence presented at trial, the court must first determine whether sufficient evidence has been presented to support the elements of a particular claim or defense.²⁰⁹ The court concluded that, because Indiana does not recognize a cause of action for negligent entrustment of an automobile brought by a voluntarily intoxicated adult and because the evidence presented at trial would have been insufficient even if Indiana did recognize such a cause of action, the trial court properly exercised its discretion in denying leave to amend.²¹⁰

G. Voluntary Dismissal

In *Knightstown Banner, LLC v. Town of Knightstown*,²¹¹ the court affirmed the trial court's grant of the defendant's motion for voluntary dismissal of its counterclaim.

The court reasoned that Rule 41(A)(2) permits a claimant to dismiss a claim voluntarily—even after a summary judgment motion has been filed—but only upon a court's order.²¹² The court further noted that voluntary dismissals should generally be allowed, unless the adverse party would suffer prejudice as a result.²¹³ In this case, the plaintiff's primary claim of prejudice was its concern that the town could reassert the same claim at a later time.²¹⁴ However, upon reviewing the record, the court concluded that the voluntary dismissal was with prejudice, thereby eliminating the plaintiff's concern regarding relitigation of the

204. *Id.* at 907-08.

205. *Id.* at 908.

206. 881 N.E.2d 996 (Ind. Ct. App. 2008).

207. *Id.* at 1006.

208. *Id.* at 1000-01.

209. *Id.* at 1001.

210. *Id.* at 1005.

211. 882 N.E.2d 270 (Ind. Ct. App.) (finding trial court did not err when imposing joint and several liability upon insurers with respect to attorney's fees and costs), *supplemented by reh'g*, 889 N.E.2d 317 (Ind. Ct. App. 2008).

212. *Id.* at 274.

213. *Id.*

214. *Id.*

defendant's voluntarily dismissed counterclaim.²¹⁵

H. Involuntary Dismissal

1. *Failure to State a Claim.*—In *American Heritage Banco, Inc. v. McNaughton*,²¹⁶ the court affirmed, in part, the trial court's dismissal of the plaintiff's fraud claim for failure to state a claim.²¹⁷

The plaintiff sought to avoid dismissal of its fraud claim by arguing that one of the defendants executed a promissory note with the stated purpose of paying off a previous loan; however, the stated purpose was intentionally and knowingly false and, as a result, the defendant obtained a loan which remains unpaid.²¹⁸ However, as the court noted, the plaintiff attached a copy of the promissory note in question as an exhibit to its complaint.²¹⁹ As reflected in the exhibit, the express purpose for the loan stated in the promissory note contradicted the allegation in plaintiff's complaint.²²⁰ Accordingly, the court rejected the plaintiff's characterization of the challenged loan transaction and noted "[a] court should not accept as true allegations that are contradicted by other allegations in the complaint or exhibits attached to or incorporated in the pleading."²²¹

2. *Want of Prosecution.*—In *Baker Machinery, Inc. v. Superior Canopy Corp.*,²²² the court affirmed the trial court's dismissal with prejudice pursuant to Rule 41(E).²²³

Following nearly two years of inactivity, the trial court entered an order pursuant to Rule 41(E), requiring that the plaintiff attend a hearing and show cause why the case should not be dismissed for want of prosecution.²²⁴ In considering the numerous factors bearing on whether to dismiss a claim for lack of prosecution, the Indiana Court of Appeals noted that "[a] lengthy period of inactivity may be enough to justify dismissal under the circumstances of a particular case, especially if the plaintiff had no excuse for the delay."²²⁵ The plaintiff sought to justify its delay in prosecuting its claims by explaining to the

215. *Id.* at 274-275.

216. 879 N.E.2d 1110 (Ind. Ct. App.) (modifying, sua sponte, incorrect citations in its original opinion), *supplemented by* 2008 Ind. App. LEXIS 2553 (Ind. Ct. App. 2008).

217. *Id.* at 1118.

218. *Id.* at 1115.

219. *Id.*

220. *Id.*

221. *Id.* (citing *Augdon v. Premier Props. USA, Inc.*, 755 N.E.2d 661, 665 (Ind. Ct. App. 2001)).

222. 883 N.E.2d 818 (Ind. Ct. App. 2008) (modifying the incorrect trial court cause number on the cover page), *trans. denied*, 898 N.E.2d 1221 (Ind. 2008), *supplemented by* 2009 Ind. App. LEXIS 2 (Ind. Ct. App. 2009).

223. *Id.* at 825.

224. *Id.* at 820.

225. *Id.* at 823 (quoting *Lee v. Pugh*, 811 N.E.2d 881, 885 (Ind. Ct. App. 2004)).

court that it lacked financial resources to engage in the litigation.²²⁶ The court acknowledged that lack of financial resources may present a practical impediment to the diligent prosecution of an action; however, the court held that this would not excuse nearly two years of inactivity and affirmed dismissal pursuant to Rule 41(E).²²⁷

3. *Same Matter Pending in Another Court.*—In *Beatty v. Liberty Mutual Insurance Group*,²²⁸ the court affirmed the trial court's dismissal of the plaintiff's claims pursuant to Rule 12(B)(8), because the same or a similar matter was already pending in another Indiana state court.²²⁹

Beatty filed two separate actions against Liberty Mutual.²³⁰ Beatty sued Liberty Mutual and two other defendants in Marion Circuit Court in 2005, alleging that Liberty Mutual acted in bad faith in denying coverage under a policy it had issued to Beatty.²³¹ In 2007, Beatty filed an action in Marion Superior Court against Liberty Mutual also alleging that Liberty Mutual breached its duty of good faith and fair dealing in denying coverage.²³²

On appeal, the court concluded that, for purposes of a Rule 12(B)(8) motion, complete identity of the parties is not necessary; rather, because both Beatty and Liberty Mutual were parties to both actions, the court held that the two actions were between the same parties.²³³ Further, the court concluded that there was a substantial overlap in the subject matter of the two actions.²³⁴ Finally, the court observed that Beatty sought the same remedy from Liberty Mutual in both courts.²³⁵ Accordingly, the court concluded that the actions filed by Beatty in Marion Circuit Court and Marion Superior Court were substantially the same and, therefore, affirmed the trial court's dismissal pursuant to Rule 12(B)(8).²³⁶

I. Discovery

1. *Duty to Supplement.*—In *Dennerline v. Atterholt*,²³⁷ the Indiana Court of Appeals affirmed the trial court's denial of the defendant's motion to strike the testimony of a belatedly disclosed witness.²³⁸

In support of his argument that the plaintiff should not be permitted to present the testimony of a belatedly disclosed witness, the defendant relied upon

226. *Id.* at 824.

227. *Id.* at 824-25.

228. 893 N.E.2d 1079 (Ind. Ct. App. 2008).

229. *Id.* at 1088-89.

230. *Id.* at 1086.

231. *Id.*

232. *Id.*

233. *Id.* at 1087.

234. *Id.*

235. *Id.*

236. *Id.*

237. 886 N.E.2d 582 (Ind. Ct. App. 2008).

238. *Id.* at 593, 603.

the Rule 26(E)(1) obligation to supplement discovery responses.²³⁹ Specifically, the defendant argued that, because the plaintiff had not disclosed the witness in its interrogatory answers or final witness list, the witness should not be permitted to testify.²⁴⁰ The court rejected this argument, as well as the defendant's argument that belatedly identified witnesses may be excluded at trial or a continuance may be granted to permit deposition of the witness.²⁴¹ The court concluded that there was no bad faith because the plaintiff had previously disclosed the witness's identity to the defendant's counsel and because the defendant made no showing that any additional discovery pertaining to this witness would have made any difference at trial.²⁴² As the court observed, the defendant's primary argument was not that he was surprised by the belatedly identified witness's testimony, "but only that it was devastating to his defense."²⁴³

2. *New Trial as a Discovery Sanction.*—In *Nature's Link, Inc. v. Przybyla*,²⁴⁴ the court affirmed the trial court's grant of a new trial in response to the plaintiff's discovery misconduct.²⁴⁵

In response to the plaintiff's interrogatories seeking identification of "all opinions and conclusions reached by any expert in the case," the defendants disclosed the content of its medical expert's anticipated testimony.²⁴⁶ Approximately two weeks before trial, the plaintiff's counsel deposed the expert with respect to his recently-produced revised report, and the expert testified that the revised report contained all of his opinions regarding the plaintiff's medical condition.²⁴⁷ However, after the plaintiff had rested his case-in-chief, the defendant's medical expert identified a new theory, i.e., that the plaintiff suffered from a genetic degenerative disorder that led to his medical condition.²⁴⁸ The expert conceded that he had not disclosed this condition in any of his reports or during his deposition; however, he asserted that he had reached the diagnosis just a few days before trial.²⁴⁹

The court began its analysis by noting that "Indiana's discovery rules are specifically designed to avoid surprise and a trial by ambush."²⁵⁰ The court concluded that the defendant breached its obligation to supplement discovery pursuant to Rule 26(E) because the defendant was aware of its expert's "materially revised medical opinion and subsequent change in intended testimony

239. *Id.* at 592.

240. *Id.*

241. *Id.*

242. *Id.* at 593.

243. *Id.*

244. 885 N.E.2d 709 (Ind. Ct. App. 2008).

245. *Id.* at 719.

246. *Id.* at 716.

247. *Id.* at 717.

248. *Id.*

249. *Id.*

250. *Id.* (quoting *Canfield v. Sandock*, 563 N.E.2d 526, 528 (Ind. 1990)).

the day before trial.”²⁵¹ As a consequence of this failure, the court concluded that the plaintiff was unable to fairly present his case at trial.²⁵² Accordingly, the court affirmed the trial court’s order for a new trial pursuant to Rule 60(B)(3).²⁵³

3. *Purpose of Sanctions.*—In *Fifth Third Bank v. PNC Bank*,²⁵⁴ the court reversed the trial court’s order imposing sanctions for discovery abuses, determining that the sanctions imposed did not effectuate the purpose of Rule 37 sanctions.²⁵⁵

Following the plaintiff’s failure to respond to document requests served by one of the defendants, the trial court entered an agreed order requiring that the plaintiff respond to the discovery requests within thirty days.²⁵⁶ However, the plaintiff again failed to respond, and approximately three months following the entry of the agreed order, the defendant moved to dismiss the plaintiff’s complaint for failure to comply with discovery.²⁵⁷ The trial court granted the motion to dismiss, noting that the plaintiff’s discovery conduct was “‘particularly egregious’” and “‘should not be without sanction.’”²⁵⁸ However, the trial court ordered that the dismissal apply only to one of the three defendants in the lawsuit.²⁵⁹

Upon appeal by the remaining defendants, the court first observed that one of the purposes underlying Rule 37 discovery sanctions is to punish or deter the violating party and thereby assure future compliance with the discovery rules.²⁶⁰ The court concluded that, by dismissing one of the three defendants but taking no other adverse action toward the plaintiff, the trial court’s sanctions order would have little, if any, deterrent effect.²⁶¹ Accordingly, the court reversed the trial court’s sanctions order and remanded with instructions that any sanctions order arising from the plaintiff’s discovery misconduct must punish the plaintiff.²⁶²

4. *Withdrawal of Deemed Admissions.*—In *Cross v. Cross*,²⁶³ the court affirmed the trial court’s grant to withdraw deemed admissions.²⁶⁴

The court observed that, under Rule 36, the failure to respond timely to requests for admissions results in those matters being deemed admitted and

251. *Id.* at 718.

252. *Id.*

253. *Id.* at 719.

254. 885 N.E.2d 52 (Ind. Ct. App. 2008).

255. *Id.* at 55-56.

256. *Id.* at 54.

257. *Id.*

258. *Id.*

259. *Id.*

260. *Id.* at 55.

261. *Id.*

262. *Id.* at 55-56.

263. 891 N.E.2d 635 (Ind. Ct. App. 2008).

264. *Id.* at 641, 645.

conclusively established.²⁶⁵ However, the court also observed that the party deemed to have made the admissions may move the court for withdrawal of the admissions under Rule 36(B).²⁶⁶ The trial court may not grant such a motion unless the withdrawal would “subserve the presentation of the merits” and would not result in prejudice to the party obtaining the admissions.²⁶⁷ The party seeking withdrawal bears the initial burden of establishing that presentation of the merits will be subserved by the withdrawal of the admissions.²⁶⁸ In this case, the court concluded that, because it was clear that the admitting party intended to dispute the issues raised in the request for admissions, she had made a sufficient showing that withdrawal of the admissions would subserve the presentation of the merits.²⁶⁹ Further, the court concluded that the party having obtained the admissions bears the burden of demonstrating that it will be prejudiced by withdrawal of the admissions.²⁷⁰ However, the party is not prejudiced merely by losing the benefit of the admissions at trial.²⁷¹ Rather, the party bears the burden of demonstrating that he has suffered a detriment in the presentation of his case, e.g., an inability to produce a key witness or present important evidence.²⁷² Because the party having obtained the admissions had approximately eighteen months to prepare his case, the court concluded that he had failed to show that he was prejudiced by withdrawal of the admissions.²⁷³ Accordingly, the court concluded that the trial court acted within its discretion in granting the motion to withdraw admissions.²⁷⁴

J. Summary Judgment

1. Summary Judgment Affidavits.—In *Guzik v. Town of St. John*,²⁷⁵ the court concluded that the trial court acted properly in striking portions of an affidavit submitted in support of summary judgment.²⁷⁶

Guzik, the former police chief of the Town of St. John, was asked to resign following the discovery of his numerous acts of misconduct.²⁷⁷ Guzik agreed to resign but subsequently brought suit against the town and its police commission, alleging that he had been coerced to resign.²⁷⁸ In response, the town and police

265. *Id.* at 639.

266. *Id.*

267. *Id.* at 639-40.

268. *Id.* at 640.

269. *Id.*

270. *Id.*

271. *Id.*

272. *Id.* at 640-41.

273. *Id.* at 641.

274. *Id.*

275. 875 N.E.2d 258 (Ind. Ct. App.), *trans. denied*, 891 N.E.2d 47 (Ind. 2008).

276. *Id.* at 265-66.

277. *Id.* at 261.

278. *Id.* at 262.

commission moved for summary judgment, arguing that Kuzik's resignation had been voluntary, not coerced.²⁷⁹ The trial court struck several provisions of Kuzik's opposing affidavit and granted summary judgment for the town and police commission.²⁸⁰

On appeal, the court first noted that the trial court has broad discretion with respect to the admissibility of evidence and that this discretion extends to ruling on motions to strike affidavits that do not comply with summary judgment rules.²⁸¹ In other words, the court observed, "affidavits in support of a motion for summary judgment must present admissible evidence that should follow substantially the same form as though the affiant were giving testimony in court in order to comply with the requirements of Trial Rule 56(E)."²⁸² The court stated that the requirements of Rule 56(E) are mandatory, such that inadmissible information contained in summary judgment affidavits should be disregarded.²⁸³

The court held that the trial court properly struck numerous provisions of Kuzik's affidavits that did not constitute facts based on his personal knowledge; rather, the stricken provisions were speculative, conclusory and irrelevant.²⁸⁴

2. *Unreliable Summary Judgment Evidence.*—In *InsureMax Insurance Co. v. Bice*,²⁸⁵ the court affirmed the trial court's denial of summary judgment where the only evidence submitted by the movant could be disbelieved by a reasonable trier of fact.²⁸⁶

Following an automobile accident, Bice sued the owner of the responsible truck, Grahg, alleging Grahg's negligence caused the accident and Bice's resulting injuries.²⁸⁷ Grahg's insurer, InsureMax intervened and moved for summary judgment, arguing that Grahg was not the driver of the truck and that the truck had been taken without Grahg's permission.²⁸⁸ In support of the motion, InsureMax presented the deposition testimony of Grahg, as well as the affidavit of his aunt.²⁸⁹

The court held that summary judgment should not be entered where a reasonable factfinder could choose not to believe the movant's evidence.²⁹⁰ Moreover, the court concluded that the trial court should not "base summary judgment solely on a party's self-serving affidavit, when evidence before the court raises a genuine issue as to the affiant's credibility."²⁹¹ The court also

279. *Id.*

280. *Id.* at 263-64.

281. *Id.* at 265.

282. *Id.*

283. *Id.*

284. *Id.* at 265-67.

285. 879 N.E.2d 1187 (Ind. Ct. App.), *trans. denied*, 891 N.E.2d 50 (Ind. 2008).

286. *Id.* at 1190-91.

287. *Id.* at 1189.

288. *Id.*

289. *Id.*

290. *Id.* at 1190 (citing *McCullough v. Allen*, 449 N.E.2d 1168, 1172 (Ind. Ct. App. 1983)).

291. *Id.* (quoting *McCullough*, 449 N.E.2d at 1172).

observed that inconsistencies or evasive language in the movant's designated evidence justify the denial of summary judgment.²⁹²

The court concluded that Grahg's deposition was self-serving and that a reasonable trier of fact could choose not to believe his account.²⁹³ The court also concluded that the trier of fact could choose not to credit the affidavit submitted by Grahg's aunt, because she is related to him.²⁹⁴ Accordingly, because a reasonable fact finder could choose to disbelieve the evidence designated by InsureMax in support of its summary judgment motion, the trial court did not err in denying summary judgment.²⁹⁵

K. Judgment on the Evidence

In *Swan Lake Holdings, LLC v. Hiles*,²⁹⁶ the court affirmed the trial court's denial of the defendant's Rule 50 motion for judgment on the evidence following the presentation of the plaintiff's case-in-chief in a premises liability action.²⁹⁷

Hiles was injured when rotten wood gave way on the roof of a structure owned by Swan Lake.²⁹⁸ Following Hiles' presentation of his case-in-chief, Swan Lake moved for judgment on the evidence pursuant to Rule 50.²⁹⁹ The trial court denied the motion, and the jury returned a verdict in favor of Hiles.³⁰⁰

On appeal, the court reviewed the standard for granting a Rule 50 motion, i.e., the court must look “only to evidence and reasonable inferences drawn most favorable to the nonmoving party and the motion should be granted only where there is no substantial evidence supporting an essential issue in the case.”³⁰¹ The court concluded that there was evidence presented, i.e., testimony that the wood supports were wet and unpainted for an extended period of time, which the jury could have used to infer that Swan Lake was on notice regarding the danger to Hiles.³⁰² Accordingly, the court held that the trial court properly determined that there was sufficient evidence to support the essential elements of Hiles' claim and that judgment on the evidence pursuant to Rule 50 would be improper.³⁰³

292. *Id.*

293. *Id.*

294. *Id.* at 1190-91.

295. *Id.* at 1191.

296. 888 N.E.2d 265 (Ind. Ct. App. 2008).

297. *Id.* at 272.

298. *Id.* at 268.

299. *Id.*

300. *Id.*

301. *Id.* at 269 (quoting *E. Chicago Police Dep't v. Bynum*, 826 N.E.2d 22, 31 (Ind. Ct. App. 2005)).

302. *Id.* at 271.

303. *Id.* at 272.

L. Relief from Judgment

In *Bunch v. Himm*,³⁰⁴ the court affirmed the trial court's grant of relief from a default order where the movant was able to demonstrate excusable neglect.³⁰⁵

As part of their divorce decree, Bunch was awarded sole custody of his children with Himm, who was ordered to pay child support.³⁰⁶ While Himm was serving in the U.S. Marine Corps and preparing for deployment to Iraq, Bunch filed a petition to modify the decree and increase Himm's weekly support obligations in light of her increased income during her active duty period.³⁰⁷ The trial court entered a default order entering Bunch's requested modifications after Himm and her counsel failed to appear for the hearing.³⁰⁸

On appeal, the court observed that, to set aside a default judgment or order pursuant to Rule 60(B)(1), the movant must demonstrate that the failure to appear resulted from excusable neglect and that the movant would have been able to present a meritorious defense.³⁰⁹ Because Himm had made arrangements to receive and respond to her mail and her failure to receive adequate notice of the hearing date was due to a breakdown in communications, the court concluded that the trial court did not abuse its discretion in determining that Himm's failure to attend the hearing was a result of excusable neglect.³¹⁰

The court also noted that Himm's request for Rule 60(B)(1) relief required that she demonstrate a meritorious defense.³¹¹ "A meritorious defense is one that would lead to a different result if the case were tried on its merits."³¹² A party need not demonstrate absolutely the existence of such a defense; rather, a *prima facie* showing of the defense is sufficient.³¹³ In this case, the court noted at least two meritorious defenses Himm could have raise, i.e., Bunch's petition to modify the divorce decree was not verified and that it failed to allege a substantial and continuing change in circumstances rendering the original decree unreasonable.³¹⁴ Accordingly, the court concluded the trial court properly exercised its discretion in setting aside the default order pursuant to Rule 60(B)(1).³¹⁵

304. 879 N.E.2d 632 (Ind. Ct. App. 2008).

305. *Id.* at 636-37.

306. *Id.* at 633-34.

307. *Id.* at 634.

308. *Id.*

309. *Id.* at 635.

310. *Id.* at 636.

311. *Id.* at 637.

312. *Id.*

313. *Id.*

314. *Id.*

315. *Id.*

M. Motion to Correct Errors

In *Paulsen v. Malone*,³¹⁶ the court reversed the trial court's grant of a motion to correct error.³¹⁷ The defendant in a personal injury action filed a timely motion to correct errors following an adverse jury verdict.³¹⁸ The trial court held a hearing and requested that the parties provide supplemental briefing for the court's consideration.³¹⁹ The parties complied and submitted supplemental briefing within twenty-four days of the hearing.³²⁰ The trial court granted the motion to correct errors twenty-two days later, which was forty-six days after the hearing.³²¹ Relying on the plain language of Rule 53.3(A), which requires that the thirty-day period in which the trial court must rule on a motion to correct errors begins when the motion is heard, and the fact that the trial court did not continue the hearing, the Indiana Court of Appeals concluded that, under Rule 53.3(A), the motion to correct errors would be deemed denied if not ruled upon within thirty (30) days of the hearing.³²²

N. Attorney Fees and Costs

1. *Costs Do Not Include Attorney's Fees.*—In *Wiley v. McShane*,³²³ the court reversed the trial court's dismissal of a will contest for the plaintiff's failure to post a bond in the amount set by the trial court.³²⁴ The court concluded that the bond set by the trial court was intended to cover the estate's litigation expenses, e.g., deposition fees, court reporter costs and attorney's fees.³²⁵ However, as the court explained, the term "costs" is a term of art and must be given its specific legal meaning.³²⁶ Because "costs" did not include litigation expenses, including attorney's fees, the court remanded for a proper costs determination and reinstatement of the will contest.³²⁷

2. *Frivolous or Groundless Litigation.*—In *Knowledge A-Z, Inc. v. Sentry Insurance*,³²⁸ the court affirmed the trial court's award of attorney's fees to the prevailing party under Indiana's "frivolous litigation statute."³²⁹ Although Indiana generally adheres to the "American Rule," whereby each party pays its own attorney's fees and costs, "[a] court may award attorney's fees to the

316. 880 N.E.2d 312 (Ind. Ct. App. 2008).

317. *Id.* at 315.

318. *Id.* at 313.

319. *Id.*

320. *Id.*

321. *Id.*

322. *Id.* at 314-15.

323. 875 N.E.2d 273 (Ind. Ct. App. 2007).

324. *Id.* at 278.

325. *Id.* at 276-77.

326. *Id.* at 276.

327. *Id.* at 277.

328. 891 N.E.2d 581 (Ind. Ct. App. 2008).

329. *Id.* at 586; *see also* IND. CODE § 34-52-1-1(b)(2) (2008).

prevailing party if the court finds that a party either continued to litigate after its 'defense clearly became frivolous, unreasonable or groundless' or 'litigated the action in bad faith.'"³³⁰ The court further observed that "[a] defense is unreasonable if, based on the totality of the circumstances, including the law and facts known at the time, no reasonable attorney would consider it justified or worthy of litigation."³³¹ Although the trial court did not enter specific findings of fact in connection with its order of attorney's fees, the defendant was trying to relitigate a matter already concluded by the trial court and affirmed by the appellate court; accordingly, the court concluded that the trial court did not abuse its discretion in awarding attorney's fees to the prevailing party.³³²

3. *Wrongfully Entered Injunction.*—In *Bigley v. MSD of Wayne Township Schools*,³³³ the court affirmed the trial court's award of attorney's fees following the dissolution of a temporary restraining order that was not replaced by a preliminary injunction.³³⁴ In accordance with Rule 65(C), the court reasoned that a party is entitled to recover attorney's fees incurred defending against a preliminary injunction as damages.³³⁵

III. AMENDMENTS TO INDIANA RULES OF TRIAL PROCEDURE

By order dated September 2007,³³⁶ the Indiana Supreme Court amended a number of Rules of Trial Procedure, including Rules 4.11, 26, 34, 37, 42, 55, 56, 63, 72, 77, 79.1 and 80, as follows:³³⁷

1. The court amended Rule 4.11 to allow for return of service by electronic transmission, in addition to transmission by mail.³³⁸

2. The court amended Rule 26(A)(3) to include request for production of electronically stored information among the accepted methods of discovery.³³⁹

3. The court amended Rule 26(B)(1) concerning the general scope of permissible discovery by adding the following paragraph:

The frequency or extent of use of the discovery methods otherwise permitted under these rules and by any local rule shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party

330. 891 N.E.2d at 585 (quoting IND. CODE § 34-52-1-1(b)(2), (3) (2008)).

331. *Id.* at 586.

332. *Id.*

333. 881 N.E.2d 77 (Ind. Ct. App. 2008).

334. *Id.* at 81-82.

335. *Id.*

336. Order Amending Indiana Rules of Trial Procedure, No. 94S00-0702-MS-49 (Ind. Sept. 10, 2007).

337. The Indiana Supreme Court also amended Trial Rules 60, 76, and 77 by order dated September 9, 2008. These amendments have been omitted from this Survey.

338. IND. TRIAL R. 4.11.

339. IND. TRIAL R. 26(A)(3).

seeking discovery has had ample opportunity by discovery in the action to obtain the information sought or; (iii) the burden of expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties’ resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues. The court may act upon its own initiative after reasonable notice or pursuant to a motion under Rule 26(C).³⁴⁰

4. The court amended Rule 26(B) by adding the following section:

(5) Claims of Privilege or Protection.

(a) Information withheld. When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

(b) Information produced. If information is produced in discovery that is subject to a claim of privilege or protection as trial preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved.³⁴¹

5. The court amended Rule 26(C) concerning protective orders by adding the following section (9):

Upon motion by any party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the county where a deposition is being taken, may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

. . . .

340. IND. TRIAL R. 26(B)(1).

341. IND. TRIAL R. 26(B)(5).

(9) that a party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause. The court may specify conditions for the discovery.³⁴²

6. The court amended Rule 34 to include production of electronically stored information, as well as sound recordings, and images.³⁴³

7. The court also amended Rule 34(B): (a) to permit a party requesting production of electronically stored information to specify the form or forms of production; (b) to require the requesting party to state the form or forms it intends to use if the requesting party does not specify a particular form; and (c) to require that the responding party produce electronically stored information in a "reasonably usable" form if the requesting party does not specify a particular form.³⁴⁴

8. The court amended Rule 37 by adding section (E), which provides: "(E) **Electronically stored information.** Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good faith operation of an electronic information system."³⁴⁵

9. The court amended Rule 42 concerning consolidation to change a statutory reference from "IC 34-1-13-1" to "IC 34-35-1-1."³⁴⁶

10. The court amended Rule 55 to clarify that a party failing to plead or otherwise comply with procedural rules may be defaulted "by the court."³⁴⁷

11. The court amended Rule 63(E) concerning judge pro tempore to change a reference from "Rule 79(14)" to "Rule 79(P)."³⁴⁸

12. The court amended the final sentence of Rule 72(C) to read as follows:

All motions and applications in the clerk's office for issuing process, including final process to enforce and execute judgments, and for other proceedings which do not require allowance or order of the court are grantable of course by the clerk; but the clerk's action may be suspended or altered or rescinded by the court upon cause shown.³⁴⁹

342. IND. TRIAL R. 26(C)(9).

343. IND. TRIAL R. 34.

344. IND. TRIAL R. 34(B).

345. IND. TRIAL R. 37(E).

346. IND. TRIAL R. 42.

347. IND. TRIAL R. 55.

348. IND. TRIAL R. 63(E).

349. IND. TRIAL R. 72(C).

13. The court amended Rule 77(B) concerning court records by deleting the last paragraph, which discussed requirements for the chronological case summary.³⁵⁰

14. The court amended Rules 79.1(G)(1) and 79.1(H) to change a statutory reference from “IC 33-11.6-7” to “IC 33-34-5-6.”³⁵¹

15. The court amended Rule 80(E) concerning comments to the bench, bar, and public by changing the mailing address for the Committee’s Executive Secretary from “115 W. Washington Street, Suite 1080” to “30 South Meridian Street, Suite 500” and made the same change to Appendix B concerning Appearance by an Attorney in a Civil Case.³⁵²

350. IND. TRIAL R. 77(B).

351. IND. TRIAL R. 79.1(G)-(H).

352. IND. TRIAL R. 80(B); IND. TRIAL R. app. B.

INDIANA CONSTITUTIONAL DEVELOPMENTS: EVOLUTION ON INDIVIDUAL RIGHTS

JON LARAMORE*

I. DECISIONS RELATING TO INDIVIDUAL RIGHTS

During the survey period, Indiana's appellate courts continued developing doctrine applying the Indiana Constitution on a number of topics. The Indiana Supreme Court issued significant opinions explaining the scope of the Open Courts Clause in article 1, section 12 and addressing the rights of accused persons under article 1, section 13. Both sections elaborate rights under the Indiana Constitution that go beyond rights extended by the United States Constitution.¹ Also, the Indiana Court of Appeals issued a decision explaining the rights of students to an adequate education under article 8 (although the Indiana Supreme Court's grant of transfer in that case shifts the issue to the higher court)² and another decision using the *Ex Post Facto* Clause to invalidate, on an as-applied basis, restrictions on residency for convicted sex offenders who have completed their sentences.³ Both courts continued to develop state constitutional doctrine on search and seizure and "multiple punishments" double jeopardy, expanding protections in both areas beyond those provided by the United States Constitution.⁴ These decisions show doctrinal advancement in some areas of individual rights guaranteed by the Indiana Constitution.

A. *The Open Courts Clause of Article 1, Section 12*

The Indiana Supreme Court used the Open Courts Clause of article 1, section 12 to invalidate a statute restricting prisoners from filing lawsuits in certain circumstances in *Smith v. Department of Correction*.⁵ The statute in question required trial courts to dismiss any civil lawsuit brought by a prisoner who previously filed three or more civil lawsuits that were dismissed as frivolous under the Frivolous Claims Act.⁶ The trial court in this case dismissed the prisoner's lawsuit, and the court of appeals affirmed, ruling that the state's interest in limiting frivolous lawsuits by prisoners outweighed a prisoner's right to file.⁷

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1. See *infra* Part I.A, C.

2. See *Bonner ex rel. Bonner v. Daniels*, 885 N.E.2d 673 (Ind. Ct. App. 2008), *trans. granted and aff'd*, 907 N.E.2d 516 (Ind. 2009).

3. See *infra* Part I.B, D.

4. See *infra* Part I.F-G.

5. 883 N.E.2d 802 (Ind. 2008).

6. See P.L. 80-2004, § 6, *codified at* IND. CODE § 34-58-2-1 (2008). The Frivolous Claims Act is found at IND. CODE § 34-58-1-2 (2008).

7. *Smith*, 883 N.E.2d at 805.

In the 3-2 decision by Justice Boehm, the Indiana Supreme Court majority applied the Open Courts Clause, which states “[a]ll courts shall be open and every person, for injury done him in his person, property, or reputation, shall have remedy by due course of law.”⁸ The court found that, while cases in Indiana and other states have examined similar provisions, there is little history showing the framers’ motivation or purpose for enacting the language.⁹

The majority in *Smith* based its decision largely on the language of the clause, stating that “as a matter of ordinary usage, the provision that remedy by due course of law is available to all is readily understood to mean, at a minimum, that to the extent the law provides a remedy for a wrong, the courts are available and accessible to grant relief.”¹⁰ The clause “demonstrates an embracing of the notion . . . of an independent judiciary, and guarantees access to the courts to redress injuries to the extent the substantive law recognizes an actionable wrong.”¹¹ The court also recognized its prior decisions holding that the clause does not restrict the legislature’s power to alter, abolish, or condition remedies.¹²

Applying this analysis, the majority invalidated the law.¹³ It noted that many states and the federal government have imposed restrictions on prisoner lawsuits, but no jurisdiction had gone as far as Indiana’s total ban, finding that Indiana law “bars claims purely on the basis of the plaintiff’s prior activity without regard to the merits of the claim presented.”¹⁴ Even if the prisoner has a clearly redressable claim, such as a claim for theft of his property, the statute would bar it.¹⁵

Smith is consistent with the court’s prior decisions applying section 12, and it also follows Indiana courts’ penchant for construing prisoners’ rights very narrowly.¹⁶ In prior cases, the Indiana Supreme Court made clear that section 12 did not restrict the General Assembly’s right to alter the scope of substantive rights and of the remedies available.¹⁷ But just as the court held in *Smith*, when the General Assembly has defined a right and provided a remedy, section 12 requires that the courts be available to effectuate that remedy.¹⁸

8. IND. CONST. art. 1, § 12.

9. *Smith*, 883 N.E.2d at 807.

10. *Id.*

11. *Id.*

12. *Id.* at 808.

13. *Id.* at 810.

14. *Id.* at 809-10.

15. *Id.* at 810.

16. See, e.g., *Israel v. Ind. Dep’t of Corr.*, 868 N.E.2d 1123, 1124 (Ind. 2007) (holding that there is no judicial review of administrative decision affecting prisoner); *McIntosh v. Melroe Co.*, 729 N.E.2d 972, 977 (Ind. 2000) (construing section 12 to allow legislative branch to define rights and remedies); *Martin v. Richey*, 711 N.E.2d 1273, 1282 (Ind. 1999) (holding that section 12 invalidates, as applied, a statute precluding a plaintiff from obtaining a remedy permitted by the legislature for a wrong defined by the legislature).

17. *McIntosh*, 729 N.E.2d at 977-78.

18. *Martin*, 711 N.E.2d at 1282.

Chief Justice Shepard dissented, noting that the court's decision would lead to greater burdens on the judicial system and would therefore hinder other litigants' cases.¹⁹ Justice Sullivan also dissented, reasoning that invalidating the statute altogether was unnecessary and advocating instead an as-applied approach, which would create exceptions to a general ban for non-frivolous prisoner cases.²⁰

B. Right to Adequate Education Under Article 8

The Indiana Supreme Court vacated the court of appeals' opinion in *Bonner ex rel. Bonner v. Daniels* when it granted transfer, and the supreme court has now entered its opinion; however, the subject matter of the lawsuit is sufficiently important to merit discussion.²¹ The lawsuit, brought by a group of public school parents on behalf of their children, alleges that the State has failed to fulfill its duty under the Indiana Constitution to provide an education "that equips them with the knowledge and skills they need to compete for productive employment, to pursue higher education, and to become responsible and informed citizens."²² The lawsuit is based in part on the existing state academic standards and argues that Indiana provides insufficient resources to some students, guaranteeing that they will not be able to meet the standards already established by the State Board of Education and other authorities as measurements of adequate education.²³

The constitutional basis for the lawsuit is article 8, section 1, which states:

Knowledge and learning, generally diffused throughout a community, being essential to the preservation of a free government; it shall be the duty of the General Assembly to encourage, by all suitable means, moral, intellectual, scientific, and agricultural improvement; and to provide, by law, for a general and uniform system of Common Schools, wherein tuition shall be without charge, and equally open to all.²⁴

The complaint sought relief in the form of two declarations:

That the Indiana Constitution imposes an enforceable duty on the General Assembly to provide a quality public education that prepares all children to function . . . in society . . . ; and Indiana's current system of financing violates the Indiana Constitution, with the result that the class of affected students are not receiving their constitutionally guaranteed

19. *Smith*, 883 N.E.2d at 811 (Shepard, C.J., dissenting).

20. *Id.* (Sullivan, J., dissenting).

21. 885 N.E.2d 673 (Ind. Ct. App. 2008), *trans. granted, opinion vacated*, No. 49S02-0809-CV-525 (Ind. Sept. 23, 2009) (unpublished), *available at* <http://indianalawblog.com/documents/092608list.pdf>. The Indiana Supreme Court ruled, in a decision after the Survey period, that the Indiana Constitution conveys no judicially enforceable right to any particular standard of educational quality. *Bonner ex rel. Bonner v. Daniels*, 907 N.E.2d 516 (Ind. 2009).

22. *Id.* at 677.

23. *Id.*

24. IND. CONST. art. 8, § 1.

right to education.²⁵

The students sued on behalf of a class, and the defendants were the Governor, the Superintendent of Public Instruction, and the State Board of Education.²⁶

The defendants first argued that the lawsuit raised no justiciable issue, at least not against the named defendants.²⁷ They argued that the plaintiffs lacked standing because they could show no personal injury; that the complaint was not redressable because declaratory relief would not guarantee improvement in the students' status; and that the named defendants could not provide relief—only the General Assembly could.²⁸ They also argued that the constitutional language was so general that it provided no judicially manageable standards for determining whether the clause was violated or a remedy was adequate.²⁹ The Indiana Court of Appeals, in a 2-1 opinion by Judge Riley, rejected each of these challenges.

The court determined that the students had standing to obtain declaratory relief because the controversy clearly affected their legal rights and they had a substantial interest in the relief sought.³⁰ The court also ruled that declaratory relief was meaningful redress for the students' complaint.³¹ The court could permissibly assume that, if the Judicial Department declared that the school funding formula was inadequate under the Indiana Constitution, action would be taken to provide a remedy without further need for coercive relief.³² The court also concluded that the defendants were proper, and the students did not have to sue the General Assembly.³³ The Governor and Superintendent, as members of the Education Roundtable, are responsible for making recommendations on education policy, and the State Board of Education is also charged with making education policy.³⁴ Also, it is common to sue executive branch officials who are responsible for carrying out legislation alleged to be unconstitutional.³⁵

With regard to the substantive issue in the case, the court concluded that article 8 provides sufficient guidance for the courts to determine whether the General Assembly is meeting whatever duty it may have to provide free public education. "On numerous occasions Indiana courts have developed standards for enforcing constitutional provisions that are sparse and require further interpretation."³⁶ Indiana courts previously have applied the language of article

25. *Bonner*, 885 N.E.2d at 679.

26. *Id.* at 673.

27. *Id.* at 681-87.

28. *Id.*

29. *Id.* at 687-88.

30. *Id.* at 683-84.

31. *Id.* at 685.

32. *Id.* at 685-86.

33. *Id.* at 687.

34. *Id.* at 686-87.

35. *Id.* at 686.

36. *Id.* at 688 (citing *Boehm v. Town of St. John*, 675 N.E.2d 318 (Ind. 1996), in which the

8 in other contexts, never finding it so vague that it could not be interpreted.³⁷ In particular, the court found guidance in the history of article 8, concluding that “the evil to be addressed by what became [a]rticle [8] of our Constitution was a lack of education and the subsequent problem of illiteracy among Indiana’s citizens.”³⁸ The court also pointed out that many other states have addressed the adequacy of their school funding formulas under their state constitutions, some with constitutional language less clear than Indiana’s.³⁹

The court concluded that the case was justiciable and that the Indiana Constitution provided sufficient standards to allow the question to be adjudicated, stating “we hold that [a]rticle [8] imposes a duty on the [s]tate to provide an education that equips students with the skill and knowledge enabling them to become productive members of society.”⁴⁰ It further concluded,

the State’s constitutional duty necessarily must extend beyond mere reading, writing, and arithmetic. It also includes broad educational opportunities needed in today’s society to prepare citizens for their role as participants and as potential competitors in today’s marketplace of ideas.⁴¹

Judge Friedlander dissented, stating his position that the Constitution commits the adequacy of education solely to the legislature.⁴²

The Indiana Supreme Court’s grant of transfer nullifies the court of appeals’ opinion. But the opinion exposes the arguments the State has raised in its attempt to avoid judicial entanglement in Indiana educational finance. As the court of appeals pointed out, a number of other states have endured protracted litigation over what funding formula and what level of funding is appropriate to meet the constitutional standard.⁴³ Time will tell whether the Indiana Supreme Court views the justiciability issue in the same way as the court of appeals, what standard the supreme court might establish for educational adequacy, and whether this litigation will move forward to break constitutional ground in Indiana.

Indiana Supreme Court interpreted general language governing property tax assessment to require wholesale changes in assessment methodology).

37. *Id.* at 689 (citing *Nagy v. Evansville-Vanderburgh Sch. Corp.*, 844 N.E.2d 481, 484-85 (Ind. 2006); *State ex rel. Clark v. Haworth*, 23 N.E. 946, 947-48 (Ind. 1890); *Robinson v. Schenck*, 1 N.E. 698, 705 (Ind. 1885)).

38. *Id.* at 691 (quoting *Nagy*, 844 N.E.2d at 484).

39. *Id.* at 692-93. The court pointed out that during the past ten years, “only eight states have refused to consider challenges similar to the case before us; whereas, seventeen states have adjudicated the claims.” *Id.* at 692 (footnotes omitted).

40. *Id.* at 694.

41. *Id.* at 695.

42. *Id.* (Friedlander, J., dissenting).

43. *Id.* at 693.

C. Rights of Individuals Accused of Crimes Under Article 1, Section 13

Indiana courts continued to expand the scope of protections provided by article 1, section 13 in cases decided during the survey period. In *Biddinger v. State*,⁴⁴ the Indiana Supreme Court addressed the right of a criminal defendant who pleads guilty to make a statement in allocution before sentencing.⁴⁵ Biddinger pleaded guilty to aggravated battery in connection with a shooting, and the plea agreement allowed the parties to argue their positions on sentencing.⁴⁶

Biddinger offered witnesses on sentencing, then at the close of evidence offered to make a statement.⁴⁷ The trial judge did not allow the statement because Biddinger did not agree to be sworn as a witness or to be cross-examined.⁴⁸ Biddinger instead made a written offer of proof of what he would have said in allocution.⁴⁹

In a unanimous opinion by Justice Rucker, the Court ruled that after pleading guilty, a defendant who asks to make an unsworn statement should be permitted to do so.⁵⁰ This ruling was based in part on article 1, section 13's provision that "the accused shall have the right . . . to be heard by himself and counsel."⁵¹ The court noted "that the Indiana Constitution places a unique value upon the desire of an individual accused of a crime to speak out personally in the courtroom and state what in his mind constitutes a predicate for his innocence of the charges."⁵² The court noted that a statute requires the trial judge to ask a defendant whether he wants to make an allocution after he has been convicted, but not when he has plead guilty (as Biddinger did).⁵³ The court ruled that when a defendant makes a request to allocute after pleading guilty, he has a right to do so.⁵⁴ Moreover, because the allocution is not testimony, but "more in the nature of a closing argument," it is not subject to cross-examination.⁵⁵ Nevertheless, in this case the court found the trial court's denial of Biddinger's allocution request harmless error because the allocution repeated information already before the trial court.⁵⁶

In another section 13 case, *Vasquez v. State*,⁵⁷ the Indiana Supreme Court concluded—in part for constitutional reasons—that a defendant has a right to obtain testimony from a witness even though the witness was disclosed after the

44. 868 N.E.2d 407 (Ind. 2007).

45. *Id.*

46. *Id.* at 409.

47. *Id.*

48. *Id.*

49. *Id.* at 409-10.

50. *Id.* at 412.

51. *Id.* (quoting IND. CONST. art. 1, § 13).

52. *Id.* (quoting *Vicory v. State*, 802 N.E.2d 426, 429 (Ind. 2004)).

53. *Id.* (citing IND. CODE § 35-38-1-5 (2006)).

54. *Id.*

55. *Id.* at 413.

56. *Id.* at 412-13.

57. 868 N.E.2d 473 (Ind. 2007).

deadline set by the trial court and, indeed, after trial began.⁵⁸ Vasquez was being prosecuted for burglary, and on the first day of trial he informed his lawyer of a potential witness who would testify that he overheard others say that they would blame Vasquez for the burglary (an undercurrent in the opinion was Vasquez's inability to communicate with his counsel, who spoke only English.)⁵⁹ When Vasquez's attorney notified the trial court about the witness, the State objected and the trial court did not permit the witness to testify.⁶⁰ It was undisputed that the failure to disclose the witness was neither intentional nor designed to obtain unfair advantage.

In a unanimous opinion by Justice Dickson, the court ruled that the witness should have been allowed to testify.⁶¹ The witness's testimony was very important, and any prejudice to the State was slight and could have been cured by a "short continuance."⁶² The court stated: "Indiana jurisprudence recognizes a strong presumption to allow defense testimony, even of late-disclosed witnesses: 'The most extreme sanction of witness exclusion should not be employed unless the defendant's breach has been purposeful or intentional or unless substantial and irreparable prejudice would result to the State.'"⁶³ The court emphasized the accused's rights under the Sixth Amendment and article 1, section 13 "to present evidence and to have a fair trial," stating they are "of immense importance."⁶⁴

The Indiana Court of Appeals also addressed section 13 in *Caraway v. State*,⁶⁵ examining when the right to counsel attaches. Caraway, an adult, was caught in a sex act with a young child and taken to the police station for questioning.⁶⁶ While the appellate opinion is not specific about Caraway's mental abilities, it notes that he could not read and that police had to read back statements he dictated.⁶⁷ Months later, a police officer visited Caraway, who had not yet been charged, and persuaded him to sign an agreement that he would take a polygraph examination and that the results of the examination would be admissible in court.⁶⁸ Caraway was read *Miranda* warnings, but not until after he signed the agreement about the polygraph.⁶⁹

Caraway's trial counsel moved to exclude the results of the polygraph test, arguing that he was never offered counsel before signing the polygraph

58. *Id.* at 477.

59. *Id.* at 474.

60. *Id.* at 475.

61. *Id.* at 477.

62. *Id.* at 475-76.

63. *Id.* at 476 (quoting *Wiseheart v. State*, 491 N.E.2d 985, 991 (Ind. 1986)).

64. *Id.* at 477.

65. 891 N.E.2d 122 (Ind. Ct. App. 2008), *reh'g denied*.

66. *Id.* at 123.

67. *Id.*

68. *Id.* at 124. Judicial opinions have restricted the admissibility of polygraph test results.

See *Owens v. State*, 373 N.E.2d 913, 915 (Ind. App. 1978).

69. *Caraway*, 891 N.E.2d at 124.

agreement.⁷⁰ The court concluded that Caraway should have been offered counsel before the polygraph agreement was discussed.⁷¹ The court stated:

Article [1], [s]ection 13 of the Indiana Constitution guarantees the right to counsel at any critical stage of the prosecution where counsel's absence might derogate from the accused's right to a fair trial; however, "the rights afforded under [s]ection 13 also attach prior to the filings of formal charges against the defendant."⁷²

Although Caraway was not charged or arrested at the time the officer discussed the polygraph examination, he was entitled to be offered counsel before the polygraph agreement was discussed with him because it was such an important aspect of his right to a fair trial (in Sixth Amendment terms, a "critical stage").⁷³ The court's decision conflicts with *Kochersperger v. State*,⁷⁴ which examined a similar issue, but the State did not seek transfer in *Caraway*.

D. Constitutional Decisions Relating to Restrictions on Sex Offenders

The Indiana Court of Appeals applied Indiana constitutional principles to three cases involving restrictions on sex offenders, and the result was a mixed bag.⁷⁵ In *Doe v. Town of Plainfield*,⁷⁶ the court approved a local ordinance excluding individuals whose names are on the Sex and Violent Offender Registry from public parks in Plainfield. The plaintiff, listed on the registry because of earlier child pornography convictions, frequently took his child to parks and recreation areas in Plainfield, but the ordinance precluded him from doing so any more.⁷⁷ The court rejected Doe's argument that his right to enter parks was protected by article 1, section 1 of the Indiana Constitution, which describes inalienable rights including "life, liberty, and the pursuit of happiness."⁷⁸ Bypassing whether article 1, section 1 creates judicially enforceable rights at all, the court concluded that the provision does not protect "the right to enter public

70. *Id.*

71. *Id.* at 126-27.

72. *Id.* (quoting *Hall v. State*, 870 N.E.2d 449, 460 (Ind. Ct. App.), *trans. denied*, 878 N.E.2d 213 (Ind. 2007)).

73. *Id.* at 127. Judge Robb concurred, basing her decision on the Fifth Amendment. *See id.* at 128 (Robb, J., concurring).

74. 725 N.E.2d 918 (Ind. Ct. App. 2000).

75. The court also invalidated a statute imposing a lifetime registration requirement on certain individuals, holding that it violated the *ex post facto* clause. *Jensen v. State*, 878 N.E.2d 400 (Ind. Ct. App. 2007), *trans. granted*, 891 N.E.2d 43 (Ind. 2008). The Indiana Supreme Court, in a decision after the Survey period, disagreed. *Jensen v. State*, 905 N.E.2d 384 (Ind. 2009).

76. 893 N.E.2d 1124 (Ind. Ct. App. 2008). The Sex and Violent Offender Registry is established by IND. CODE § 36-2-13-5.5 (2007).

77. *Doe*, 893 N.E.2d at 1128.

78. *Id.* at 1132.

parks for legitimate purposes.”⁷⁹ The court also rejected Doe’s argument that the ordinance violated his right under article 1, section 12, which the court said “contains a substantive component requiring legislative enactments to be rationally related to a legitimate legislative goal.”⁸⁰ Doe argued that excluding those on the registry from public parks is not rationally related to the goal of public protection because no evidence shows that any particular person on the registry is likely to re-offend.⁸¹ The court concluded that this argument did not support Doe’s facial challenge to the ordinance because it did not foreclose constitutional application of the ordinance “in all instances.”⁸² This approach may leave open the door for as-applied challenges by individuals listed on the registry who can prove that they pose little or no risk of re-offending. The court also rejected Doe’s challenge under article 1, section 24, the *Ex Post Facto* clause of the Indiana Constitution.⁸³ The court found that the ordinance was not an impermissible *ex post facto* law because its primary intent was not punitive, but rather aimed mainly at public protection.⁸⁴

In *State v. Pollard*,⁸⁵ in contrast, the Indiana Court of Appeals invalidated a statute governing sex offenders as applied to Pollard. The statute precluded persons on the Sex and Violent Offender Registry from living within 1000 feet of a school, youth program center, or public park.⁸⁶ Pollard had lived at the same address, in a home he owned, for twenty years.⁸⁷ In 1997, he was convicted of committing a sex-related offense, and he was required to place his name on the registry.⁸⁸ The statute prohibiting anyone on the registry from living within 1000 feet of a school, youth program center, or public park was enacted in 2006,⁸⁹ long after Pollard bought his home and almost a decade after his conviction.⁹⁰ In 2007, the State charged Pollard with violating the residency statute.⁹¹

The Indiana Court of Appeals concluded that the statute was criminal in nature because it created a class D felony for someone on the registry to live within 1,000 feet of a school, youth program center, or public park.⁹² It further

79. *Id.* at 1131. The Indiana Court of Appeals previously has cast doubt on whether article 1, section 1 contains any judicially enforceable rights. *See Morrison v. Sadler*, 821 N.E.2d 15, 31-32 (Ind. Ct. App. 2005).

80. *Doe*, 893 N.E.2d at 1132.

81. *Id.* at 1133.

82. *Id.*

83. *Id.* at 1136.

84. *Id.* at 1135-36.

85. 886 N.E.2d 69 (Ind. Ct. App. 2008), *trans. granted and rev’d*, 908 N.E.2d 1145 (Ind. 2009).

86. IND. CODE § 35-42-4-11 (2006).

87. *Pollard*, 886 N.E.2d at 71.

88. *Id.*

89. IND. CODE § 35-42-4-11 (2006).

90. *Pollard*, 886 N.E.2d at 71.

91. *Id.*

92. *Id.* at 73-74.

held that the effect of the statute was to “[increase] the penalty applied to affected sex offenders by preventing those offenders from residing and taking full advantage of their ownership rights in property acquired prior to conviction and prior to the imposition of the statute.”⁹³ The court invalidated the statute as to Pollard and persons in similar circumstances because of the importance of property rights and the statute’s retroactive restriction on property ownership in violation of article 1, section 24.⁹⁴

E. Article 1, Section 22’s Limits on Shielding Assets from Creditors

*Prime Mortgage USA, Inc. v. Nichols*⁹⁵ addressed many issues arising from a shareholder dispute, including one issue of Indiana constitutional law. After the trial court awarded the plaintiff approximately \$8 million in damages, she took a number of steps to collect her judgment, including garnishment orders.⁹⁶ The constitutional issue arose from an attempt to garnish a life insurance policy obtained by the corporation for its employee, who was also a judgment debtor in the case. Indiana Code section 27-1-12-17.1 exempts such insurance policies, in their entirety, from creditors’ claims.⁹⁷

The constitutionality of this statute is suspect under article 1, section 22, which allows the legislature to enact laws “exempting a reasonable amount of property from seizure or sale” to allow a debtor “to enjoy the necessary comforts of life.”⁹⁸ Unlimited exemptions from garnishment such as the one in this case are suspect.⁹⁹ “[W]hen the statute contains no limitation, our supreme court has put the burden on the debtor to demonstrate that the exemption fits within the ‘necessary comforts of life purpose of the Indiana Constitution.’”¹⁰⁰ Because the defendant made no effort to justify the unlimited nature of the exemption, the Indiana Court of Appeals remanded this portion of the case to the trial court for relevant evidence, concluding it was “not in a position to conclude that the claimed exemption is not reasonably necessary” or to determine “whether any or part of the value of the . . . insurance policy is sufficiently related to [Defendant’s] enjoyment of the necessary comforts of life.”¹⁰¹

F. Limits on Searches and Seizures Under Article 1, Section 11

The Indiana Supreme Court applied federal and state constitutional principles

93. *Id.* at 74.

94. *Id.* at 75.

95. 885 N.E.2d 628 (Ind. Ct. App. 2008).

96. *Id.* at 666.

97. *See* IND. CODE § 27-1-12-17.1 (2006).

98. *Id.* at 670 (quoting IND. CONST. art. 1, § 22).

99. *Id.* (citing *Citizens Nat’l Bank of Evansville v. Foster*, 668 N.E.2d 1236, 1242 (Ind. 1996)).

100. *Id.* at 671 (quoting *Citizens Nat’l Bank*, 668 N.E.2d at 1242) (internal quotation omitted).

101. *Id.* at 672.

to invalidate a search in *Campos v. State*,¹⁰² involving a roadside search after a traffic stop. The unanimous decision was written by Justice Boehm. An officer pulled over the car containing Campos and Santiago because it had been speeding.¹⁰³ The officer questioned the two occupants separately, and their stories did not match completely.¹⁰⁴

After giving a written warning, the officer told them they could leave.¹⁰⁵ But before they did so, he asked if they had anything illegal in the car.¹⁰⁶ After they denied having anything illegal, the officer asked if he could search the car. “Santiago asked, ‘Is it really necessary?’¹⁰⁷ [The officer] responded, ‘Yes.’”¹⁰⁸ While the car was being searched, Campos and Santiago were placed in the police car, where they were recorded on the car’s video system, without their knowledge, making incriminating admissions.¹⁰⁹ The search of the car revealed cocaine.¹¹⁰

The court concluded that the officer had probable cause to detain the pair but lacked probable cause to search the car, so valid consent was necessary for the fruits of the search to be admissible.¹¹¹ The court applied the federal standard to assess voluntariness of the consent, stating that the same standard applied under article 1, section 11 of the Indiana Constitution.¹¹² The court ruled that when the officer told Santiago that the search was “necessary,” it was the same as saying that Santiago had no right to say no, making the consent involuntary and the search invalid.¹¹³

The court found a separate violation of the Indiana Constitution under the doctrine of *Pirtle v. State*.¹¹⁴ That case expands a suspect’s rights beyond the guarantees of the U.S. Constitution, requiring that a suspect who is in custody be offered the opportunity to consult with a lawyer before being asked for consent to a search.¹¹⁵ In this case, the State contended that Santiago was not in custody when he was asked whether he would consent to a search of the car.¹¹⁶ The court again relied on the officer’s statement that consent was “necessary” to conclude that *Pirtle* applied because “no reasonable person would think that he had the right to leave or to decline [the officer’s] request” under those circumstances, and

102. 885 N.E.2d 590 (Ind. 2008).

103. *Id.* at 594.

104. *Id.* at 595.

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.* at 595-96.

110. *Id.* at 596.

111. *Id.* at 598.

112. *See id.* at 600.

113. *Id.*

114. *Id.* at 601-02 (citing *Pirtle v. State*, 323 N.E.2d 634, 640 (Ind. 1975)).

115. *See Pirtle*, 323 N.E.2d at 640.

116. *Campos*, 885 N.E.2d at 601.

thus, Santiago was in custody.¹¹⁷ Because Santiago was not offered legal counsel before being asked to consent to the search, the search was invalid on that separate ground.¹¹⁸ The court excluded the evidence found in the search and remanded for a new trial.¹¹⁹

The court further concluded that Santiago's and Campos's videotaped statements while in the police car were admissible.¹²⁰ Because there was no interrogation, no *Miranda* warning had to be given, and the pair had no reasonable expectation of privacy within the police car.¹²¹ Santiago and Campos offered no separate analysis under the Indiana Constitution as to the videotaped statements; so the court did not separately analyze that claim.¹²²

The Indiana Supreme Court addressed the retroactivity of a constitutional decision on searches in *Membres v. State*,¹²³ another drug case. Evidence against Membres was found in a search of the trash that he had placed outside for regular pickup. Membres argued that he should be protected by the holding governing trash searches in *Litchfield v. State*,¹²⁴ which was decided two weeks after the search that led to his conviction.¹²⁵

In a 3-2 decision, the court ruled that *Litchfield* did not apply retroactively to *Membres*'s case.¹²⁶ At the time of Membres's search, the governing case was *Moran v. State*,¹²⁷ which allowed a search of trash left out at the curb on a totality of circumstances analysis.¹²⁸ The court stated that "*Litchfield* expressly adopted the requirement of articulable individualized suspicion as an elaboration of *Moran* but did not overrule *Moran*."¹²⁹ *Litchfield* was consistent with *Moran* but not foreshadowed by *Moran*, and thus, *Litchfield* represented a new rule of criminal procedure.¹³⁰

The court recognized the general principle that new rules of criminal procedure are applied retroactively to cases not yet final (that is, when trial or appeal still is pending) when the new rule is announced.¹³¹ But Indiana is not required to follow this federal principle when the new rule arises from the state constitution.¹³²

117. *Id.*

118. *Id.*

119. *Id.* at 603.

120. *Id.*

121. *Id.* at 602.

122. *Id.* at 602 n.3.

123. 889 N.E.2d 265 (Ind. 2008), *reh'g denied*.

124. 824 N.E.2d 356 (Ind. 2005).

125. *Membres*, 889 N.E.2d at 268.

126. *Id.* at 275.

127. 644 N.E.2d 536 (Ind. 1994).

128. *Membres*, 889 N.E.2d at 269-70 (citing *Moran*, 644 N.E.2d at 539-40).

129. *Id.* at 271.

130. *Id.*

131. *Id.* at 271-72.

132. *Id.* at 272.

The majority, in a decision by Justice Boehm, distinguished cases involving the exclusionary rule for special retroactivity analysis.¹³³ The exclusionary rule, the majority stated, is designed to deter law enforcement misconduct and not to ensure a fair trial or exclude unreliable evidence.¹³⁴ Because the purpose of the exclusionary rule is deterrence and does not affect the fairness of the trial, the majority ruled that a new rule of criminal procedure relating to the exclusionary rule need not be applied retroactively.¹³⁵ “The rule announced in *Litchfield* is designed to deter random intrusions into the privacy of all citizens. Retroactive application of that rule would not advance its purpose for the obvious reason that deterrence can operate only prospectively.”¹³⁶

The majority’s ultimate application of these principles was as follows:

Litchfield applies in *Litchfield* itself, and also any other cases in which substantially the same claim was raised before *Litchfield* was decided. But challenges to pre-*Litchfield* searches that did not raise *Litchfield*-like claims in the trial court before *Litchfield* was decided are governed by pre-*Litchfield* doctrine” even if the cases were “not yet final” at the time *Litchfield* was decided.¹³⁷

Because the search in this case was reasonable under the *Moran* standard, the majority ruled that the evidence could be admitted.¹³⁸

Justice Sullivan dissented, arguing that longstanding retroactivity principles required *Litchfield* to be applied retroactively.¹³⁹ He also noted that, under the court’s analysis, Membres could have succeeded only if he had raised a *Litchfield* argument in the fourteen days between his arrest and the issuance of *Litchfield*—a time during which charges were not even filed against him.¹⁴⁰ Justice Rucker dissented in part and concurred in result, echoing Justice Sullivan’s point that longstanding case law required retroactive application of *Litchfield*.¹⁴¹ But Justice Rucker concluded that the search would be valid under *Litchfield*, justifying his concurrence.¹⁴²

The Indiana Court of Appeals applied the Indiana Constitution to several other searches during the survey period. In *Wendt v. State*,¹⁴³ the court addressed the good faith exception to the warrant requirement under article 1, section 11. A search of Wendt’s home, made pursuant to a warrant, turned up drugs and

133. *Id.* at 273.

134. *Id.*

135. *Id.* at 274.

136. *Id.*

137. *Id.*

138. *Id.* at 275.

139. *Id.* at 276 (Sullivan, J., dissenting).

140. *Id.* at 277.

141. *Id.* at 278-79 (Rucker, J., dissenting in part and concurring in result).

142. *Id.* at 281.

143. 876 N.E.2d 788 (Ind. Ct. App. 2007), *trans. denied*, 891 N.E.2d 38 (Ind. 2008).

paraphernalia.¹⁴⁴ Wendt argued that the warrant should not have been issued because the officer providing information to the issuing magistrate indicated that the confidential informant who was the source of the information had provided reliable information in similar situations previously.¹⁴⁵ In fact, the informant's prior information, while reliable, had come when the confidential informant was himself implicated in the crime, not when he was acting as a confidential informant.¹⁴⁶ The court, in a unanimous opinion by Judge May, found that the officer providing the information for the warrant had misinformed the issuing magistrate, but not intentionally.¹⁴⁷ The court also approved application of a good faith exception under the Indiana Constitution based on both the similarity of the language in article 1, section 11 to the Fourth Amendment and the lack of "any compelling reason for rejecting" the Fourth Amendment good faith exception.¹⁴⁸

But the Indiana Court of Appeals used section 11 to find unreasonable the lengthy detention of a suspect prior to arrest in *Buckley v. State*.¹⁴⁹ Police suspected Buckley in a murder, followed his car when he left his home, and stopped him after he committed traffic infractions.¹⁵⁰ Police did not ticket him, but rather told him he was not free to leave until a detective arrived to question him.¹⁵¹ Police then took him to a police station, where he was kept for several hours before search warrants could be obtained, and his car was impounded.¹⁵² Police found a hand gun in his car, and he was convicted of its illegal possession—not the murder.¹⁵³ The court found these actions unreasonable in the context of the totality of circumstances under article 1, section 11 and suppressed the gun.¹⁵⁴ The court concluded that the officers lacked probable cause to arrest Buckley and that holding him for hours violated his rights.¹⁵⁵ Applying the *Litchfield* factors, the court concluded that, although police had reasonable suspicion Buckley had committed a murder, the degree of intrusion into Buckley's ordinary activities was "substantial" and law enforcement needs were minimal because there was no emergency.¹⁵⁶

144. *Id.* at 789.

145. *Id.*

146. *Id.* at 791.

147. *Id.*

148. *Id.* at 790 (quoting *Mers v. State*, 482 N.E.2d 778, 783 (Ind. Ct. App. 1985) (also applying good faith exception under Indiana Constitution)); see *Hopkins v. State*, 582 N.E.2d 345, 351 (Ind. 1991) (citing *Mers* with approval); see also *United States v. Leon*, 468 U.S. 897, 923 (1984) (establishing good faith exception under the U.S. Constitution).

149. 886 N.E.2d 10 (Ind. Ct. App. 2008).

150. *Id.* at 13.

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.* at 16.

155. *Id.* at 15.

156. *Id.*

The court evaluated standing to contest a search under section 11 in *Allen v. State*,¹⁵⁷ in which Allen was convicted of murdering his mother and grandparents and burying them under concrete in the basement of the grandparents' home. After the murders, Allen lived in the home for several weeks and had keys to the residence, and he claimed that his privacy interest in the home was violated by the warrantless search that discovered the bodies.¹⁵⁸ Allen had no Fourth Amendment standing because the home was not his.¹⁵⁹ A defendant has standing to contest a search under section 11 if he establishes "ownership, control, possession, or interest in the premises searched or the property seized."¹⁶⁰ In a unanimous opinion by Judge Crone, the court concluded that Allen had no standing to challenge the search because he had no legitimate possessory interest in the home—he lived there only because of his crime, which eliminated the lawful possessors.¹⁶¹ Allen was a trespasser who obtained possession by illegal means, and thus lacked standing to challenge the search.

In another standing case, *Jackson v. State*,¹⁶² the passenger in a traffic stop challenged the results of a search of the passenger compartment of the car, which led to his conviction for sale of cocaine. Applying standing language from *Campos*,¹⁶³ the Indiana Court of Appeals concluded that federal and state standing principles were identical in these circumstances, and "[w]here the defendant offers sufficient evidence indicating that he has permission of the owner to use the vehicle, the defendant plainly has a reasonable expectation of privacy in the vehicle and standing to challenge the search of the vehicle."¹⁶⁴ In this case, there was no evidence indicating that Jackson lacked permission to be in the car, which belonged neither to him nor the driver.¹⁶⁵ Because it was uncontested that Jackson had a right to be in the car, the court concluded that he had standing to challenge the search.¹⁶⁶ The court concluded, however, that the search was a reasonable inventory search and did not suppress the evidence.¹⁶⁷

The Indiana Court of Appeals approved a search warrant although it was based on stale information in *Mehring v. State*.¹⁶⁸ Investigators linked Mehring

157. 893 N.E.2d 1092 (Ind. Ct. App. 2008), *trans. denied*.

158. *Id.* at 1095.

159. *Id.*

160. *Peterson v. State*, 674 N.E.2d 528, 534 (Ind. 1996).

161. *Allen*, 893 N.E.2d at 1100.

162. 890 N.E.2d 11 (Ind. Ct. App. 2008).

163. *Campos v. State*, 885 N.E.2d 590, 595 (Ind. 2008).

164. *Id.* at 16 (quoting *Campos*, 885 N.E.2d at 598-99).

165. *Id.* at 16-17.

166. *Id.* at 17.

167. *Id.* at 19. In the unanimous opinion by Judge Mathias, the court cautioned "that inventory searches performed at the scene [of the arrest] invite challenges. Inventory searches conducted at the impound lot by an officer assigned to such duties are greatly preferred to searches conducted at the scene, without a warrant, by the arresting officer." *Id.* (citation omitted).

168. 884 N.E.2d 371, 373 (Ind. Ct. App.), *trans. denied*, 898 N.E.2d 1222 (Ind. 2008).

to child pornography, tracing web postings to his home computer.¹⁶⁹ Although he had moved since the initial determination that the child pornography was posted from his home computer, police obtained a warrant for Mehring's residence based on expert testimony that traffickers in child pornography kept images for long periods of time.¹⁷⁰ In a 2-1 decision written by Judge Friedlander, the court determined that the warrant was valid despite the passage of ten months since the discovery of the information on which the warrant was based.¹⁷¹ After a thorough Fourth Amendment analysis, the court stated that a "different analysis" must be applied under section 11 despite its similar wording.¹⁷² The court concluded that

the totality of the circumstances—including, the information contained in the [probable cause] affidavit, the nature of the crime, the nature of the items being sought, and the normal and common sense inferences regarding where one might keep such items—established a substantial basis to believe that there was a fair probability that evidence of child pornography would be found in Mehring's apartment.¹⁷³

In a different case, the court also found that two-week-old information from a reliable informant that drugs were being sold at a given location was not sufficiently stale to render it unreasonable as a basis for law enforcement examination of household trash, which led to a search warrant, arrest, and conviction.¹⁷⁴

In *McDermott v. State*,¹⁷⁵ the defendant was standing in the middle of a street shouting incoherently at traffic. When police approached, he fled, eventually entering the unlocked front door of a home.¹⁷⁶ He would not identify himself or provide identification, police did not know whether the home he entered was his, and they entered the home and ultimately subdued him with a taser and arrested him for resisting law enforcement, disorderly conduct, and public intoxication.¹⁷⁷ McDermott argued that the officers' warrantless entry to his home was unreasonable under section 11.¹⁷⁸ Emphasizing the importance of learning McDermott's identity to protect public safety, the court concluded that their entry

169. *Id.* at 374.

170. *Id.*

171. *Id.* at 381.

172. *Id.*

173. *Id.* Judge Mathias dissented, stating first that the expert testimony that child pornographers retain their images for long periods of time was not corroborated or subject to cross-examination; second that law enforcement could easily have obtained corroboration by electronically eavesdropping on Mehring's computer; and third that there is little case law support for such lengthy delays before obtaining a warrant. *Id.* at 382-83 (Mathias, J., dissenting).

174. *Teague v. State*, 891 N.E.2d 1121, 1130 (Ind. Ct. App. 2008).

175. 877 N.E.2d 467, 469 (Ind. Ct. App. 2007), *trans. denied*, 891 N.E.2d 39 (Ind. 2008).

176. *Id.* at 469-70.

177. *Id.* at 470.

178. *Id.* at 471.

into the home was reasonable and not in violation of section 11.¹⁷⁹ In *Rush v. State*,¹⁸⁰ the court similarly approved warrantless entry into a home to investigate underage drinking, which was obvious based on neighbors' reports and conduct that could be observed from the street.

The court rejected police actions at another party in *King v. State*,¹⁸¹ where officers staged a roadblock to stop each person leaving the party. The court relied on *State v. Gerschoffer*,¹⁸² in which the Indiana Supreme Court established rules for drunk driving roadblocks under the Indiana Constitution.¹⁸³ The court rejected the roadblock because it was not established pursuant to a formal policy, used no neutral guidelines to determine which cars should be stopped, and was targeted at a specific group rather than the general public.¹⁸⁴ Also, the court noted that there was no evidence presented at trial that the officers had perceived that anyone at the party consumed alcohol, further negating any purpose for the roadblock.¹⁸⁵ The court found not only that police conduct was not reasonable, but also that there was very little evidentiary basis in the record justifying any sort of police intrusion at all. The court rejected the evidence obtained at the roadblock showing that one driver was intoxicated and reversed his conviction.¹⁸⁶

The Indiana Court of Appeals also used the Indiana Constitution as a basis for rejecting an automobile search that occurred after a legitimate traffic stop, but with no reasonable suspicion that the driver had committed any other crime.¹⁸⁷ It also invalidated an automobile search conducted after an officer arrested the driver for operating while intoxicated, when the officer had no suspicion of any other crime.¹⁸⁸ It found that seeking identification from a passenger in a traffic stop is not unreasonable under article 1, section 11, using the *Litchfield* factors to conclude that the intrusion is minimal and law enforcement need was substantial because of the concern for officer safety.¹⁸⁹

179. *Id.* at 473.

180. 881 N.E.2d 46, 53 (Ind. Ct. App. 2008).

181. 877 N.E.2d 518, 524 (Ind. Ct. App. 2007).

182. 763 N.E.2d 960 (Ind. 2002).

183. *King*, 877 N.E.2d at 521 (citing *Gerschoffer*, 763 N.E.2d 960).

184. *Id.* at 522.

185. *Id.*

186. *Id.* at 525.

187. *Baniaga v. State*, 891 N.E.2d 615, 620 (Ind. Ct. App. 2008). The officer admitted that he did not suspect the driver of drug use (he found drugs in his search); rather "he searched her vehicle because he was looking for '[a]nything. Anything at all. Just—you never know what you'll find.'" *Id.*

188. *State v. Parham*, 875 N.E.2d 377, 380 (Ind. Ct. App. 2007), *trans. denied*, 891 N.E.2d 36 (Ind. 2008). The officer testified that he did not base the search on a concern for his safety. *Id.* at 379.

189. *Cade v. State*, 872 N.E.2d 186, 188-89 (Ind. Ct. App.), *trans. denied*, 878 N.E.2d 218 (Ind. 2007).

G. Protection Against Double Jeopardy Under Article 1, Section 14

Indiana's courts continued to develop their separate test, based on article 1, section 14, for "multiple punishments" double jeopardy.¹⁹⁰ The first part of Indiana's test is the same as the federal "multiple punishments" test, addressing whether each crime for which a defendant is convicted contains at least one element not contained by any other crime for which the defendant was convicted.¹⁹¹ But Indiana's test does not stop there. Rather, Indiana law contains an "actual evidence" test, examining whether each offense of which a defendant is convicted is proved by at least one fact not used to prove any other offense of which the defendant was convicted. To succeed on this claim, "a defendant must demonstrate a reasonable possibility that the evidentiary facts used by the factfinder to establish the essential elements of one offense may also have been used to establish the essential elements of a second challenged offense."¹⁹²

The Indiana Supreme Court applied this test in *Lee v. State*,¹⁹³ in which a defendant had been convicted of burglary and armed robbery after forcing his way into an apartment, brandishing a gun, making threats, and demanding money.¹⁹⁴ Lee argued that the jury could have used his barging into the house to establish both the burglary and the substantial step toward armed robbery that supported his conviction on that charge.¹⁹⁵

In a unanimous opinion by Justice Boehm, the court noted that it "ha[d] decided several cases where there were separate facts to support two convictions, but the case was presented in a way that left a reasonable possibility that the jury used the same facts to establish both."¹⁹⁶ But in other cases, the court did not find any violation of the "actual evidence" test when the charging information, jury instructions, arguments of counsel, or other factors showed that the State presented its case so that each charge was established by separate facts, even if the jury theoretically could have found that multiple charges were established by the same facts.¹⁹⁷

In *Lee*, the court ruled that it was likely that the jury used different facts to convict Lee of each offense, basing its conclusion in part on "the fact that the prosecutor highlighted these specific facts as she reviewed the elements of each crime in her closing argument."¹⁹⁸ These arguments established that "the

190. See *Richardson v. State*, 717 N.E.2d 32, 49-50 (Ind. 1999) (explaining separate test).

191. See *Blockburger v. United States*, 284 U.S. 299, 302 (1932) (establishing federal test).

192. *Richardson*, 717 N.E.2d at 53. Indiana courts have done little to explain the significance of the word "essential" in this test. In application, the word "essential" appears to be superfluous.

193. 892 N.E.2d 1231 (Ind. 2008).

194. *Id.* at 1234-35.

195. *Id.* at 1235.

196. *Id.* (citing *Bradley v. State*, 867 N.E.2d 1282 (Ind. 2007); *Lundberg v. State*, 728 N.E.2d 852 (Ind. 2000); *Guffey v. State*, 717 N.E.2d 103 (Ind. 1999)).

197. *Id.* at 1236 (citing *Redman v. State*, 743 N.E.2d 263 (Ind. 2001); *Griffin v. State*, 717 N.E.2d 73 (Ind. 1999)).

198. *Id.*

burglary was complete when Lee barged into the home, but the attempted armed robbery was just beginning.”¹⁹⁹ The court pointed out that “more deliberate prosecution of multiple offenses would avoid these double jeopardy problems.”²⁰⁰ If prosecutors make clear in charging instruments, instructions, and closing arguments which facts are intended to prove which offenses, the double jeopardy problem will seldom exist.

Prosecutors took this advice to heart in at least two cases during the survey period, where the Indiana Court of Appeals rejected double jeopardy arguments because careful prosecutors clearly separated the evidence supporting one conviction from evidence supporting another. In *Hardley v. State*,²⁰¹ the Indiana Court of Appeals affirmed convictions of confinement and battery because the charging instrument clearly stated that the confinement charge was based on Hardley’s holding the victim down while the battery charge was based on striking her with his fists. Similarly, in *Storey v. State*,²⁰² the Indiana Court of Appeals affirmed a conviction for possession of methamphetamine with intent to deliver and another conviction of manufacture of methamphetamine. At trial, the prosecutor used a quantity of unfinished methamphetamine to support the conviction for manufacturing and a quantity of finished methamphetamine to support the conviction of possession.²⁰³ “It is evident to us that the State carefully parsed the evidence pertaining to both the possession and manufacturing offenses,” the Court stated.²⁰⁴ “In doing so, the State set forth independent evidence that Storey (1) possessed methamphetamine in excess of three grams with the intent to deliver and (2) manufactured methamphetamine in excess of three grams.”²⁰⁵ This appeal was Storey’s second based on the same incident. His first conviction was reversed on Fifth Amendment grounds.²⁰⁶ Ironically, Storey’s co-defendant had certain convictions reversed on appeal because of double jeopardy violations, and the prosecution in Storey’s retrial heeded the advice in the co-defendant’s appellate decision that “the State may have been able to support dual convictions by carefully parsing the evidence at trial.”²⁰⁷

199. *Id.*

200. *Id.* at 1237.

201. 893 N.E.2d 1140, 1142-43 (Ind. Ct. App. 2008), *trans. granted and aff’d in part*, 905 N.E.2d 399 (Ind. 2009). Senior Judge Patrick Sullivan dissented on the double jeopardy issue, arguing that the state did not sufficiently separate the facts supporting the charges and that there was “a reasonable possibility” under *Richardson v. State*, 717 N.E.2d 32 (Ind. 1999), that the jury used the same evidence to convict of two crimes. *Hardley*, 893 N.E.2d at 1147-48. The supreme court opinion on transfer left this holding undisturbed but addressed an important sentencing issue.

202. 875 N.E.2d 243, 250 (Ind. Ct. App. 2007), *trans. denied*, 891 N.E.2d 35 (Ind. 2008).

203. *Id.* at 248.

204. *Id.* at 250.

205. *Id.*

206. *Storey v. State*, 830 N.E.2d 1011, 1022 (Ind. Ct. App. 2005), *aff’d*, 875 N.E.2d 243 (Ind. Ct. App. 2007), *trans. denied*, 891 N.E.2d 35 (Ind. 2008).

207. *Storey*, 875 N.E.2d at 248 (quoting *Caron v. State*, 824 N.E.2d 745, 754 n.6 (Ind. Ct.

The Indiana Court of Appeals vacated certain convictions during the survey period as failing the “same evidence” test. In *Williams v. State*,²⁰⁸ the court ruled that the same evidence—the fact that Williams presented a stolen and fraudulent check for a bank to negotiate—supported convictions of both forgery and attempted theft. The court therefore reversed the conviction on the lesser offense, attempted theft.²⁰⁹ A second case, also called *Williams v. State*,²¹⁰ presented a more complicated fact pattern and convictions of attempted rape, criminal confinement resulting in serious bodily injury, and battery resulting in serious bodily injury.²¹¹ After a thorough analysis of the facts proved at trial, Judge Darden’s opinion concludes that it was unlikely the jury used the same facts to support the convictions for attempted rape and battery, but that there was “a reasonable probability . . . that the same evidentiary facts the jury used to establish his commission of these two offenses were also used to establish the essential elements of the third offense—criminal confinement.”²¹² The State failed to establish that the force used to accomplish the attempted rape and criminal confinement was different than the force used to commit the battery. The court therefore reversed the criminal confinement conviction.²¹³ In *Smith v. State*,²¹⁴ the Indiana Court of Appeals applied the “same evidence” test sua sponte to reverse a criminal conviction arising from an attempted jail escape.²¹⁵ The court found it “improper for the State to rely on evidence of the same injury to sustain a conviction for both class A felony robbery and class B felony aggravated battery.”²¹⁶ The State presented evidence of only one injury, and as a result, “there is a reasonable possibility the jury used the same evidence to establish the essential injury elements of both the elevated robbery charge and the aggravated battery charge.”²¹⁷ The court remanded with instructions to enter judgment on the robbery charge as a C felony, not elevated for the injury.²¹⁸

The Indiana Court of Appeals rejected double-jeopardy arguments under the State Constitution in several cases where proof of distinct acts occurred. In *Moore v. State*,²¹⁹ the court rejected a double jeopardy argument relating to rape and criminal deviate conduct. The court concluded that Moore’s pre-trial guilty plea to battery could not be used “to deprive the State of the opportunity to fully

App. 2005).

208. 892 N.E.2d 666, 669 (Ind. Ct. App.), *trans. denied*, 898 N.E.2d 1228 (Ind. 2008).

209. *Id.*; see *Richardson v. State*, 717 N.E.2d 32, 55 (Ind. 1999) (reasoning that vacating the lesser conviction is the proper remedy).

210. 889 N.E.2d 1274 (Ind. Ct. App.), *trans. denied*, 898 N.E.2d 1225 (Ind. 2008).

211. *Id.* at 1277.

212. *Id.* at 1280 (internal quotations omitted).

213. *Id.*

214. 881 N.E.2d 1040 (Ind. Ct. App. 2008).

215. *Id.* at 1047.

216. *Id.* at 1048.

217. *Id.*

218. *Id.*

219. 882 N.E.2d 788 (Ind. Ct. App. 2008).

prosecute, or to determine which charges will, or will not, be pursued against him.”²²⁰ In other words, a defendant cannot manufacture a multiple-punishments double-jeopardy problem by pleading guilty to a lesser included offense. The court also rejected his argument for reversal based on the contention that his convictions of rape and criminal deviate conduct were based on the same use of force that supported the battery conviction.²²¹ The court found evidence of separate force supporting each of the three convictions.²²² The court rejected double-jeopardy arguments as to six counts of forgery and twenty-one counts of practicing nursing without a license in *Lohmiller v. State*,²²³ concluding that Lohmiller’s signatures on twenty-seven different documents were each separate acts supporting different convictions.²²⁴ Similarly in *Rawson v. State*,²²⁵ the court affirmed convictions for attempted aggravated battery, intimidation, and criminal recklessness, concluding that the intimidation charge was proved by Rawson’s brandishing a gun, the aggravated battery conviction was proved by his firing the gun, and the criminal recklessness conviction was supported by his separately firing a gun in the direction of another victim.²²⁶

H. Issues of Sentencing and Proportionality

During the survey period, both the Indiana Supreme Court and Indiana Court of Appeals revised criminal sentences under authority derived from article 7, section 4 of the Indiana Constitution. Some of these cases are analyzed in Professor Schumm’s article on developments in Indiana criminal law, also appearing in this issue of the *Indiana Law Review*.²²⁷

*Manigault v. State*²²⁸ applied the provision of article 1, section 16 requiring sentencing proportional to the offense. Manigault was convicted of possession of cocaine within 1,000 feet of a family housing complex, a B felony.²²⁹ He challenged the sentence, arguing that if he had merely possessed cocaine he would have been guilty of only a class D felony; so he argued that he was punished disproportionately for the same crime.²³⁰ The Indiana Court of Appeals

220. *Id.* at 793.

221. *Id.* at 795.

222. *Id.* at 794-95.

223. 884 N.E.2d 903, 914 (Ind. Ct. App. 2008).

224. *Id.*; see also *Bennett v. State*, 883 N.E.2d 888, 893 (Ind. Ct. App. 2008) (convictions of three counts of child molesting supported by evidence of three separate incidents), *trans. denied*.

225. 865 N.E.2d 1049, 1054-56 (Ind. Ct. App.), *trans. denied*, 878 N.E.2d 206 (Ind. 2007).

226. *Id.* at 1055; see also *Baltimore v. State*, 878 N.E.2d 253, 260-61 (Ind. Ct. App. 2007) (convictions of burglary resulting in bodily injury and sexual battery supported by evidence of two separate touchings), *trans. denied*, 891 N.E.2d 38 (Ind. 2008).

227. See Joel M. Schumm, *Recent Developments in Indiana Criminal Law and Procedure*, 42 IND. L. REV. 937 (2009).

228. 881 N.E.2d 679 (Ind. Ct. App. 2008).

229. *Id.* at 684.

230. *Id.* at 688.

ruled unanimously that there was no violation of the Proportionality Clause because the State was required to prove additional facts to elevate the offense to class B.²³¹

I. Free Expression Under Article 1, Section 9

The prior article on Indiana constitutional law discussed the Indiana Court of Appeals' opinion in *A.B. v. State*, which held that a student's derogatory comments about her principal on the MySpace social networking site was protected speech under article 1, section 9.²³² On transfer, the Indiana Supreme Court also reversed the student's juvenile adjudication, but not based on constitutional rights.²³³ Rather, the court concluded that the student's post did not meet the statutory requirement that it be intended to "harass, annoy, or alarm another person" because it was posted on a private portion of the website, and the court could discern no intent to communicate the message to the principal.²³⁴

In *Anderson v. State*,²³⁵ the Indiana Court of Appeals affirmed a conviction for disorderly conduct over a challenge that the defendant's speech was protected political speech under article 1, section 9. The defendant made profane and angry comments directed at police officers who removed him from a tanning booth at the request of management after he failed to leave when his time expired, and he continued those comments even after being escorted out of the business.²³⁶ The court concluded that these comments were not political comments directed at the arresting officers, but rather were comments on his own behavior that interfered with the ability of police to fulfill their duties.²³⁷

J. Mental Illness and Capital Punishment

The Indiana Supreme Court's decision in *Overstreet v. State* addressed when

231. *Id.*

232. Jon Laramore, *Indiana Constitutional Developments: Incremental Change*, 41 IND. L. REV. 923, 928-29 (2008) (citing *A.B. v. State*, 863 N.E.2d 1212 (Ind. Ct. App. 2007), *trans. granted and rev'd*, 885 N.E.2d 1223 (Ind. 2008)).

233. *A.B. v. State*, 885 N.E.2d 1223, 1227-28 (Ind. 2008).

234. *Id.* at 1227. The court noted that the record contained little information about the operation of MySpace, and the court did independent research to discern its operation, particularly with regard to which portions of the website are private. In the opinion, Justice Dickson wrote:

The Commentary to Canon 3B of the Indiana Code of Judicial Conduct advises: "A judge must not independently investigate facts in a case and must consider only the evidence presented." Notwithstanding this directive, in order to facilitate understanding of the facts and application of relevant legal principles, this opinion includes information regarding the operation and use of MySpace from identified sources outside the trial record.

Id. at 1224.

235. 881 N.E.2d 86, 91-92 (Ind. Ct. App. 2008).

236. *Id.* at 88-89.

237. *Id.* at 90.

severe mental illness can bar a death-sentenced prisoner's execution under the U.S. and Indiana constitutions.²³⁸ Although the U.S. Constitution prohibits execution of one who is "insane," the law has insufficiently developed exactly who fits within that definition.²³⁹ Overstreet suffered from severe, documented mental illness, including some type of schizophrenia.²⁴⁰ The illness caused hallucinations and illusions, and Overstreet "heard voices" of devils and demons.²⁴¹

In the opinion by Justice Rucker, the court nevertheless found that Overstreet's condition did not satisfy the federal test.²⁴² Although he "suffers from a severe, documented mental illness . . . [that] is a psychotic disorder that is the source of gross delusions," the delusions did not prevent him "from comprehending the meaning and purpose of the punishment to which he has been sentenced."²⁴³

The court also analyzed the case under the Indiana Constitution, which prohibits "cruel and unusual punishments" and requires that penalties be proportionate to the nature of the offense.²⁴⁴ The court recited that the Indiana Constitution requires a different analysis than federal provisions and that it may provide additional protections.²⁴⁵

In this portion of the opinion, Justice Rucker wrote for himself only, adopting the "logic and underlying rationale" of *Atkins v. Virginia*,²⁴⁶ the U.S. Supreme Court case prohibiting the execution of persons who were mentally retarded.²⁴⁷ Justice Rucker stated his belief that severe mental illness indicates diminished capacity to understand and process information, to communicate, and to learn and engage in logical reasoning and impulse control.²⁴⁸ These reasons supported prohibiting execution of those with mental retardation and should similarly prohibit execution of those with severe mental illness, Justice Rucker wrote.²⁴⁹ He found "no principled distinction" between the reasons for not executing mentally retarded persons and the reasons for not executing mentally ill persons.²⁵⁰ No other justices agreed with Justice Rucker's analysis, and they "vote[d] to affirm the judgment" sustaining Overstreet's conviction and death sentence against post-conviction challenge.²⁵¹

238. 877 N.E.2d 144 (Ind. 2007), *cert. denied*, 129 S. Ct. 458 (2008).

239. *Id.* at 172 (citing *Ford v. Wainwright*, 477 U.S. 399, 410 (1986)).

240. *Id.* at 172-73.

241. *Id.* at 173.

242. *Id.*

243. *Id.* (quoting *Panetti v. Quarterman*, 551 U.S. 930, 960 (2007)).

244. IND. CONST. art. 1, § 16.

245. *Overstreet*, 877 N.E.2d at 174.

246. 536 U.S. 304 (2002).

247. *Overstreet*, 877 N.E.2d at 175.

248. *Id.*

249. *Id.*

250. *Id.*

251. *Id.* A short opinion by Chief Justice Shepard, speaking for the other justices, stated that

II. DECISIONS RELATING TO GOVERNMENTAL STRUCTURE AND POWERS

A. *Exhausting Administrative Remedies in Constitutional Challenges*

The Indiana Court of Appeals examined whether exhaustion of administrative remedies was required to challenge the constitutionality of an agency's rule in *LHT Capital, LLC v. Indiana Horse Racing Commission*.²⁵² The case arose in the context of transfer of ownership of a pari-mutuel race track by LHT to another entity.²⁵³ During the time period before the Horse Racing Commission was to approve the license transfer as required by statute, the Commission adopted an emergency rule stating that in considering whether to grant a request to transfer ownership of a horse racing track "the commission will consider the extent to which the state would share in any monetary payment to or economic benefit realized by the person divesting the ownership interest."²⁵⁴ LHT asserted in the appeal that the Commission requested a payment of \$15 million to the State as a condition of approving the sale.²⁵⁵

At the administrative hearing on the transfer application, LHT did not raise the constitutionality of the rule.²⁵⁶ On appeal, LHT stated that the Commission's counsel indicated before the hearing that the Commission would not entertain a challenge to the rule's constitutionality, but there was no record support for that assertion.²⁵⁷ In its petition for judicial review of the Commission's decision—which approved the transfer conditioned upon payment to the State of \$9 million, a \$9 million charitable contribution, and a \$10 million investment in a private business—LHT alleged that the rule was void for vagueness, violated separation of powers principles, went beyond the Commission's jurisdiction, and was an unconstitutional taking.²⁵⁸

The Indiana Court of Appeals ruled that the trial court lacked jurisdiction over the petition for judicial review because LHT had not exhausted its administrative remedies, and exhaustion is a jurisdictional prerequisite.²⁵⁹ Because LHT failed to raise the constitutionality of the rule before the

the issue already had been decided adversely to Overstreet in *Matheney v. State*, 833 N.E.2d 454 (Ind. 2005), and *Baird v. State*, 831 N.E.2d 109 (Ind. 2005). *Overstreet*, 877 N.E.2d at 176. Justice Boehm then wrote separately to state his view that those cases did not decide the issue *Overstreet* presented, but that he believed the Indiana Constitution's protections in this area coincided with those of the U.S. Constitution, and thus gave *Overstreet* no relief. *Id.* at 177-78.

252. 891 N.E.2d 646 (Ind. Ct. App. 2008), *trans. denied*.

253. *Id.* at 649.

254. *Id.* at 648-49 (quoting 71 IND. ADMIN. CODE § 11-1-13(d) (2006)).

255. *Id.* at 650.

256. *Id.* at 651.

257. *Id.* at 650 n.4.

258. *Id.* at 651.

259. *Id.* at 656-57.

Commission, its failure to exhaust precluded judicial review of the question.²⁶⁰ The court also concluded that LHT's failure to exhaust was not excused.²⁶¹ The court rejected LHT's argument that exhaustion would have been futile because no evidence in the record supported any argument that the Commission would not have taken the argument seriously.²⁶² LHT's failure to exhaust also was not excused because the Commission lacked authority to address constitutional issues.²⁶³ The court noted that even when a party complains that a statute is unconstitutional and the agency lacks authority to address the question, exhaustion still may be required to resolve the case on other grounds, make a factual record, or develop a record of the agency's position.²⁶⁴ The court noted that the cases excusing exhaustion on constitutional questions were declaratory judgment actions, not petitions for judicial review of actions the agency already took.²⁶⁵ In this case, the court found that LHT negotiated an agreement with the Commission to obtain quick action on license transfer to facilitate installation of slot machines at the race track and did not raise the constitutional question to avoid disrupting the settlement.²⁶⁶ LHT "accepted the benefits of its agreement," then tried to challenge the settlement on judicial review after benefiting from it.²⁶⁷ Stating that it might have reached a different conclusion if LHT had sought declaratory relief before any administrative hearing was held, the court affirmed dismissal of the judicial review action because LHT did not exhaust administrative remedies on the constitutional question it raised.²⁶⁸

B. Division of Powers Under Article 3

The Indiana Supreme Court addressed division of powers in *Clark County Council v. Donahue*,²⁶⁹ where judges sought a declaratory judgment indicating what the county council could lawfully do with supplemental adult probation fees. The law requires judges to charge a user fee to persons on probation.²⁷⁰ The same statute specifies that the fees are to be placed in each county's

260. *Id.* at 656.

261. *Id.*

262. *Id.* at 654. LHT alleged that the Commission's general counsel indicated that the Commission would not entertain a constitutional challenge, but that allegation was unsupported by any record evidence. *Id.* at 650 n.4.

263. *Id.* at 654.

264. *Id.* In this case, for example, the Commission might have determined not to enforce its rule or to do so only minimally.

265. *Id.* at 655-56 (distinguishing cases that involve declaratory judgments from the case at bar).

266. *Id.* at 656.

267. *Id.*

268. *Id.*

269. 873 N.E.2d 1038 (Ind. 2007), *reh'g denied*.

270. IND. CODE § 35-38-2-1(b) (2008).

“supplemental adult probation services fund.”²⁷¹ The county council argued that it could use the fund without participation by the judges in where the funds were used and that the funds could be used for purposes including, but not limited to, probation services.²⁷² In contrast, the judges argued that judges have the responsibility to determine how the fund is to be spent.²⁷³

The court found the answer in the statute, which it interpreted to require the fund to be spent only for supplemental or new probation services and increases or expansions of existing probation services.²⁷⁴ The court concluded that “constitutional due process and separation of functions considerations point to this result.”²⁷⁵ The court continued, “[p]robation users’ fees are imposed on persons convicted of crimes. The Due Process Clause of the U.S. Constitution and analogous protections under the Indiana Constitution limit the amount and circumstances under which probation users’ fees and other conditions may be imposed on criminal defendants.”²⁷⁶ If ongoing court and probation operations were dependent upon the fees, courts might be (or appear) tempted to convict more people to raise more revenue, a violation of due process and analogous state principles.²⁷⁷

C. Due Course of Law (Article 1, Section 12) and Equal Privileges and Immunities (Article 1, Section 23)

As usual during the survey period, a small number of cases raised challenges to statutes under the Due Course of Law Clause in article 1, section 12 and the Equal Privileges and Immunities Clause in article 1, section 23, but they failed to meet the high standard the courts have set for such challenges to succeed. The Indiana Supreme Court rejected an equal privileges challenge under the Worker’s Compensation Act (Act) in *Brown v. Decatur County Memorial Hospital*.²⁷⁸ The court ruled that, under the Act, a medical provider obtaining compensation for treating a patient was not entitled to interest on his claim because the Act did not provide for interest.²⁷⁹ The court then rejected the provider’s claim that denying him interest violated the Equal Privileges and Immunities Clause because other medical providers were entitled to interest when they sued in court.²⁸⁰ The court found that providers obtaining payment within the worker’s compensation system were different than other medical providers; so, it was permissible for the

271. *Id.* § 35-38-2-1(f).

272. *Donahue*, 873 N.E.2d at 1039-40.

273. *Id.* at 1040.

274. *Id.* at 1041 (construing IND. CODE § 35-38-2-1(f), (h) (2008)).

275. *Id.* at 1042.

276. *Id.*

277. *Id.*

278. 892 N.E.2d 642 (Ind. 2008).

279. *Id.* at 649-50.

280. *Id.* at 651.

legislature to treat them differently by not providing for interest.²⁸¹ Those treating patients eligible for worker's compensation are guaranteed that their claims will be paid, while other medical providers "may or may not receive payment for services rendered," justifying different treatment.²⁸²

A plaintiff challenged provisions of the Occupational Diseases Act on equal privileges and immunities grounds in *Roberts v. ACandS, Inc.*²⁸³ The worker's compensation claim was made by the widow of an insulator who died from asbestos-related illness.²⁸⁴ She sued multiple parties, and some settled by making payments.²⁸⁵ ACandS, Roberts's direct employer, then moved to dismiss the worker's compensation claim against it because, under Indiana Code section 22-3-7-36, when an employee obtains payment for an injury from a third party, the employer's obligation under the worker's compensation system ceases.²⁸⁶ The court found that the statute violated neither article 1, section 12 nor article 1, section 23.²⁸⁷ The plaintiff challenged the statute as applied to her, claiming that it created two subclasses, employees injured through no fault of their own and employees injured at least in part by the actions of their employers, and denied full compensation to the second group.²⁸⁸ The court rejected this contention, holding that it is no violation to allow fault to be apportioned to the employer even though no compensation is forthcoming from the employer because of the Act²⁸⁹. Rather, it held that the worker's compensation system is not fault-based, and "[t]he humanitarian purpose of these acts is to provide workers with an expeditious and *adequate* remedy, not a complete remedy."²⁹⁰ Thus, it is permissible as part of the overall, no-fault worker's compensation system to eliminate one source of payment (the employer) when the employee opts to pursue relief through different channels.

The court also rejected a section 12 challenge, made on an as-applied basis, contending that the law unreasonably and arbitrarily burdened the plaintiff's ability to obtain "a complete tort remedy."²⁹¹ Rather, section 12 does not specify any particular remedy, but only guarantees a right to pursue judicially any remedy that the General Assembly may have prescribed for a given harm.²⁹²

Adding to the lengthy list of cases applying article 1, section 12 in the medical malpractice context is the Indiana Supreme Court's decision in

281. *Id.*

282. *Id.*

283. 873 N.E.2d 1055 (Ind. Ct. App. 2007).

284. *Id.* at 1057.

285. *Id.* at 1057-58.

286. *Id.* at 1058 (citing IND. CODE § 22-3-7-36 (2006)).

287. *Id.* at 1060-63 (discussing the Privileges and Immunities Clause and the Open Courts Clause).

288. *Id.* at 1060.

289. *Id.* at 1062.

290. *Id.*

291. *Id.*

292. *Id.* (citing *Cantrell v. Morris*, 849 N.E.2d 488, 499 (Ind. 2006)).

Brinkman v. Beuter.²⁹³ The Indiana Supreme Court has ruled that the two-year, occurrence-based medical malpractice statute of limitations is facially constitutional but may be unconstitutional as-applied in certain cases where strict application would deny a plaintiff the remedies otherwise guaranteed by law.²⁹⁴ This principle makes applying the statute of limitations fact sensitive. In *Brinkman*, the plaintiff had a difficulty pregnancy, delivered a healthy baby in 1995, and shortly thereafter suffered from eclampsia and its symptoms, including pain and seizures.²⁹⁵ She was advised to avoid another pregnancy.²⁹⁶ In 2000 she became pregnant again, and her new treating physician told her that her medical treatment in 1995 had been improper and she should not have been counseled to refrain from having children.²⁹⁷ She then sued for malpractice. The Indiana Supreme Court ruled that her lawsuit was untimely.²⁹⁸ The statute of limitations began to run in 1995, and she was well aware of her symptoms at that time and could have obtained additional medical and legal opinions.²⁹⁹ Unlike cases where the illness had a long latency and could not be detected until after the statute of limitations had expired, the Brinkmans were aware of the facts and symptoms in 1995, and nothing prevented them from investigating and filing suit at that time.³⁰⁰

In re Creation of South-West Lake Maxinkuckee Conservancy District included several challenges to the establishment of this district to provide sewage treatment, most about whether various procedural requirements for establishing the district were met.³⁰¹ The intervenor challenging the district also argued that his rights under article 1, section 12 were violated because he was not given an opportunity to opt out of the district, while others were.³⁰² He argued that allowing some to opt out precluded them from being heard on whether they should be part of the district, violating the provision of section 12 stating that “every person, for injury done to him in his person, property, or reputation, shall have remedy by due course [of] law.”³⁰³ The court rejected this claim because it failed to disclose that a full hearing had been held at which all with interests could be heard and those with similar interests were treated similarly.³⁰⁴

293. 879 N.E.2d 549 (Ind. 2008). Many of the cases applying section 12 in the medical malpractice context are discussed in the opinion at 553-54.

294. *Id.* at 554 (citing *Martin v. Richey*, 711 N.E.2d 1273 (Ind. 1999); *Van Dusen v. Stotts*, 712 N.E.2d 491 (Ind. 1999)).

295. *Id.* at 551.

296. *Id.*

297. *Id.* at 552.

298. *Id.* at 554-55.

299. *Id.*

300. *Id.*

301. 875 N.E.2d 222 (Ind. Ct. App. 2007), *trans. denied*, 891 N.E.2d 40 (Ind. 2008).

302. *Id.* at 233.

303. *Id.* (quoting IND. CONST. art. 1, § 12).

304. *Id.* at 233-34.

RECENT DEVELOPMENTS IN INDIANA CRIMINAL LAW AND PROCEDURE

JOEL M. SCHUMM*

The General Assembly and Indiana's appellate courts confronted several significant issues during the survey period October 1, 2007, to September 30, 2008. The General Assembly created new crimes, altered penalties for existing crimes, and saw a couple of new laws struck down by federal judges. Sentencing issues assumed less prominence than in recent years on the dockets of the supreme court and court of appeals. A wide range of other issues received some play, including bail, interpreters, online crimes against children, plea agreements, and probation. This Survey seeks not only to summarize the significant legislation and court opinions but also to offer some perspective on their likely future impact.

I. LEGISLATIVE DEVELOPMENTS

Although property tax relief dominated the 2008 short session of the General Assembly,¹ several bills affecting criminal law and procedure were also enacted. A few appeared to be in response to recent judicial decisions, while others appeared grounded in broader societal concerns, usually creating new offenses or increasing the penalty for existing offenses. Two of these new bills were found unconstitutional by federal judges before taking effect.

A. *New Offenses*

The General Assembly created the new offense of sexual communication with a child under fourteen, which is defined as the knowing or intentional communication concerning sexual activity with a child less than fourteen "with the intent to gratify the sexual desires of the person."² The base offense is a Class B misdemeanor, but is enhanced to a Class A misdemeanor if committed via a computer.³ In addition, individuals with prior convictions for a variety of sex offenses, or who have been found to be a sexually violent predator, can no longer use social networking websites, instant messaging, or chat room programs that the offender knows allows access to children under age eighteen.⁴ The

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1. *See Another Job Still Undone*, INDIANAPOLIS STAR, Mar. 12, 2008, at 8.

2. IND. CODE § 35-42-4-13 (2008).

3. *Id.* The court of appeals has previously remarked that more severe treatment of offenses committed online versus face-to-face was "somewhat troubling" on its face, but found no proportionality violation because of the great deference given to the legislature, which "may have deemed that use of the internet may expose Indiana children to dangers that require a greater vigilance by society, or that use of the internet lessens inhibitions." *Laughner v. State*, 769 N.E.2d 1147, 1156 (Ind. Ct. App. 2002).

4. *See* IND. CODE § 35-42-4-12 (2008).

offense is a Class A misdemeanor for the first offense or a Class D felony if the defendant has a prior conviction for the same offense.⁵

Outside the realm of sex and the Internet, the General Assembly also enacted new offenses for: failing to report a dead body (within three hours of finding a body under various “suspicious or unusual circumstances”);⁶ inmate fraud, when a prisoner obtains or attempts to obtain money through misrepresentations;⁷ disarming a law enforcement officer;⁸ and possession of looted property.⁹ The legislature also expanded the duties of drivers (and now passengers) involved in accidents) to seek help in the event of an accident.¹⁰ Finally, the invasion of privacy statute¹¹ was amended to include violations of no-contact orders on defendants in lawful detention¹² and no-contact orders imposed as a condition of an executed sentence.¹³

B. Enhanced Penalties

The General Assembly also enhanced penalties for several existing offenses. The penalty for operating a vehicle while intoxicated may now be enhanced to a Class C felony if the defendant has a prior conviction for operating while intoxicated resulting in death or serious bodily injury.¹⁴ Birth certificate fraud may now be charged as a D felony if the person makes a false or fraudulent statement regarding the birth certificate; alters, counterfeits, or mutilates a birth certificate; or uses the same.¹⁵ Persons under twenty-one now face a Class C misdemeanor—rather than an infraction—if they make a false statement or present false identification in the quest to procure an alcoholic beverage.¹⁶ Adults similarly face greater penalties for recklessly or knowingly furnishing alcohol to a minor, which is a Class B misdemeanor for a first offense, a Class

5. *Id.*

6. *Id.* § 35-45-19-3.

7. *Id.* § 35-43-5-20.

8. *Id.* § 35-44-3-3.5. The base offense is a Class C felony. It is elevated to a Class B felony if the officer is seriously injured or a Class A felony if the officer dies or if the officer is seriously injured and the officer’s firearm is taken. *Id.*

9. *See* IND. CODE § 14-21-1-36 (Supp. 2008). The offense is a Class D felony but can be enhanced to a Class C felony if the cost to carry out an archeological investigation on the site damaged to obtain the looted property is at least \$100,000. *Id.*

10. *Id.* §§ 9-26-1-1, 9-26-1-1.5.

11. IND. CODE § 35-46-1-15.1 (2008).

12. *Id.* § 35-46-1-15.1(12) (referencing IND. CODE § 35-33-8-3.2 (2008)).

13. *Id.* § 35-46-1-15.1(13) (referencing IND. CODE § 35-38-1-30) (2008)). This amendment appears to be in response to recent supreme court cases holding that felony statutes do not authorize the imposition of a no-contact order as part of an executed sentence. *See, e.g., Jarrett v. State*, 829 N.E.2d 930, 932 (Ind. 2005); *Laux v. State*, 821 N.E.2d 816, 819 (Ind. 2005).

14. *See* IND. CODE § 9-30-5-3 (Supp. 2008).

15. *See* IND. CODE § 16-37-1-12 (2008).

16. IND. CODE § 7.1-5-7-1 (Supp. 2008).

A misdemeanor for any subsequent offense, and a Class D felony if the alcohol is the proximate cause of serious bodily injury or death to any person.¹⁷ Finally, in stark contrast to the usual trend of escalating criminal penalties, an environmental permit statute was amended to reduce the penalty for tampering with records, monitoring devices, or monitoring data from a Class D felony to a Class B misdemeanor.¹⁸

In addition to these changes, two amendments could also lead to longer sentences. The list of statutory aggravating circumstances was expanded to encompass crimes committed when the defendant knew or should have known the victim was suffering from a disability.¹⁹ The statute limiting the imposition of consecutive sentences committed as part of the same criminal episode to the next higher level felony²⁰ was amended to add two new offenses to the list of exemptions: A person who operates a vehicle while intoxicated causing serious bodily injury to another person or who commits resisting law enforcement as a felony can face unlimited consecutive sentences.²¹

C. Flexibility for Probation

Continuing the trend of allowing trial courts latitude in dealing with probation, the General Assembly amended Indiana Code section 35-38-2-3 to make clear that trial courts can impose one or more sanctions on probationers who violate conditions of probation.²² This was likely in response to the court of appeals's opinion in *Prewitt v. State (Prewitt I)*,²³ which held that trial courts did not have the authority in revocation hearings both to execute a portion of a previously executed sentence and to modify conditions of probation.²⁴ Even before the legislative change, however, the Indiana Supreme Court had held otherwise, emphasizing the importance of "creative and case-specific sentences," which serve "the public interest by giving judges the ability to order sentences they deem to be most effective and appropriate for individual defendants who violate probation."²⁵

D. Reduced Credit Time for "Credit Restricted Felons"

Before June 30, 2008, most defendants served one-half of their term of imprisonment based on long-standing statutory provisions that allow for good time credit. Defendants imprisoned for a crime or in jail awaiting trial are

17. *Id.* § 7.1-5-7-8.

18. *Id.* § 13-30-10-1.

19. IND. CODE § 35-38-1-7.1(7) (2008).

20. *Id.* 35-50-1-2(c).

21. *Id.* § 35-50-1-2(a)(15) & (16).

22. *Id.* § 35-38-2-3.

23. 865 N.E.2d 669 (Ind. Ct. App.), *vacated by* 878 N.E.2d 184 (Ind. 2007).

24. *Id.* at 672.

25. *Prewitt v. State (Prewitt II)*, 878 N.E.2d 184, 187 (Ind. 2007).

generally assigned to Class I.²⁶ Such a person could be reassigned to Class II or III if he or she violates certain rules of the department of correction or the penal facility.²⁷ Such reassignments could have a significant effect on the length of a person's incarceration; defendants in Class I earn one day of credit for each day of credit confined, those in Class II earn one day for every two days confined, and those in Class III receive no credit time.²⁸

House Enrolled Act 1271 dramatically changed credit time statutes for "persons convicted after June 30, 2008."²⁹ That legislation created a new category of defendants known as "[c]redit restricted felon[s]."³⁰ This category includes defendants (1) at least twenty-one years old who are convicted of child molesting involving sexual intercourse or deviate sexual conduct involving a child under the age of twelve; (2) convicted of child molesting resulting in serious bodily injury or death; or (3) convicted of murder (a) while committing or attempting to commit child molesting, (b) of a victim of a sex crime for which the person was convicted, or (c) of a victim known to be a witness against the defendant in a prosecution for a sex crime if the murder was committed to prevent that person from testifying.³¹

Credit restricted felons may not be assigned to Class I or II but instead are initially assigned to a newly created Class IV.³² By virtue of this assignment, the person "earns (1) day of credit time for every six (6) days the person is imprisoned for a crime or confined awaiting trial or sentencing."³³ If a class IV defendant violates correctional rules, he or she may be assigned to Class III and earn no credit time.³⁴ A credit restricted felon may never be assigned to Class I or II.³⁵

Although legislatures generally have very broad authority in assigning penalties for an offense,³⁶ this new statute likely runs afoul of the prohibition on ex post facto laws as applied to those who committed offenses before June 30,

26. IND. CODE § 35-50-6-4(a) (2008).

27. *Id.* § 35-50-6-4(c).

28. *Id.* § 35-50-6-3.

29. *See* H.E.A. 1271, 115th Leg. 2d Reg. Sess. (Ind. 2008).

30. IND. CODE § 35-41-1-5.5 (2008).

31. *Id.*

32. *Id.* § 35-50-6-4(b).

33. *Id.* § 35-50-6-3(d).

34. *Id.* §§ 35-50-6-4(d), -6-3(c).

35. *Id.* § 35-50-6-4(b).

36. Federal precedent imposes a nearly impossible burden in challenging a non-capital sentence as excessive under the Eighth Amendment. *See generally* *Ewing v. California*, 538 U.S. 11 (2003). In rare circumstances, Indiana courts have found penalties disproportionate under article 1, section 16 of the Indiana Constitution. *See, e.g.,* *Connor v. State*, 626 N.E.2d 803 (Ind. 1993) (holding that sentence for dealing fake marijuana cannot exceed sentence for dealing actual marijuana); *Poling v. State*, 853 N.E.2d 1270, 1276 (Ind. Ct. App. 2006) (finding a section 18 violation when "one defendant can receive a harsher sentence than another for the very same crime").

2008.³⁷ The focus of the Ex Post Facto Clause is the time a crime “was committed.”³⁸ States may not enact laws that impose “additional punishment to that then prescribed.”³⁹ The purpose of this provision is to give “fair warning” of the effect of criminal laws “and permit individuals to rely on their meaning until explicitly changed.”⁴⁰

“[E]ven if a statute merely alters penal provisions accorded by the grace of the legislature, it violates the Clause if it is both retrospective and more onerous than the law in effect on the date of the offense.”⁴¹ In *Weaver v. Graham*,⁴² the Court found a change in Florida statutes providing for “gain time” credit for good conduct in prison violated the Ex Post Facto Clause.⁴³ The pre-1979 version of the statute awarded five, ten, or fifteen days per month as “gain time for good conduct.”⁴⁴ Legislation passed in 1978, effective January 1, 1979, changed the formula, reducing those credits to only three, six, or nine days per month as gain-time credit.⁴⁵ The petitioner, who pleaded guilty to a crime that occurred on January 31, 1976,⁴⁶ successfully argued this reduction in gain-time credit violated the Ex Post Facto Clause.⁴⁷ The Court reasoned the new law “substantially alter[ed] the consequences attached to a crime already completed, and therefore change[d] the quantum of punishment.”⁴⁸ Put another way, the amended statute constricted the opportunity “to earn early release, and thereby ma[de] more onerous the punishment for crimes committed before its enactment.”⁴⁹

H.E.A. 1271, like the statutory amendment at issue in *Weaver*, is both retrospective and more onerous than the previous statutes. Under the pre-2008 statutory scheme, all defendants began in Class I and remained there unless they committed a violation of correctional facility rules.⁵⁰ They earned one day of credit for each day served, which meant they served fifty percent of their sentence.⁵¹ For example, if an advisory sentence of thirty years for a Class A felony was imposed, the defendant would serve an actual sentence of fifteen years. Under the amended statutory scheme, however, defendants convicted of

37. U.S. CONST. art. 1, § 10.

38. *Weaver v. Graham*, 450 U.S. 24, 28 (1981).

39. *Id.* (string citation omitted); *accord* Cal. Dep’t of Corr. v. Morales, 514 U.S. 499, 504, 506 n.3 (1995) (reiterating that laws may not “increase[] the penalty by which a crime is punishable”).

40. *Weaver*, 450 U.S. at 28-29.

41. *Id.* at 30-31.

42. 450 U.S. 24 (1981).

43. *Id.*

44. *Id.* at 26.

45. *Id.* at 26-27.

46. *Id.* at 26.

47. *See generally id.*

48. *Id.* at 33 (quotation omitted).

49. *Id.* at 36.

50. IND. CODE § 35-50-6-4(a) (2007).

51. *See id.* § 35-50-6-3.

an offense that renders them a “credit restricted felon” begin in a newly created Class IV through which they earn one day of credit for every six days served.⁵² Thus, a defendant who receives a thirty year sentence would be required to serve more than twenty-five and a half years. Just as in *Weaver*, the new statute constricts the opportunity “to earn early release, and thereby makes more onerous the punishment for crimes committed before its enactment.”⁵³

E. Unconstitutional Before Taking Effect

Finally, two pieces of legislation were declared unconstitutional by different federal judges before the bills even took effect. Chief Judge Hamilton entered a declaratory judgment against amendments to Indiana Code section 11-8-8-8(b), which would have required registered sex offenders and violent offenders no longer on probation or parole to “consent to the search of their personal computers or devices with internet capability at any time” and “consent to installation on the same devices, at their expense, of hardware or software to monitor their internet use.”⁵⁴ Although felons are often “prohibited from possessing guns, voting, and holding certain professional positions,”⁵⁵ this legislation went considerably further by violating the Fourth Amendment protection of one’s home.⁵⁶ “Unlike registering public information or working in particular professions, the right to privacy in one’s home and personal effects is fundamental.”⁵⁷

Days later, Judge Barker granted summary judgment in favor of a group of booksellers and artists who challenged amendments to Indiana Code section 23-1-55-2, which would have required any entity intending to sell “sexually explicit materials” to register with the secretary of state and “provide a statement detailing the types of materials that the person intends to offer for sale or sell.”⁵⁸ The registration would have been a matter of public record; the secretary of state would have been required to notify local officials of registrants; and registrants would have been required to pay a fee.⁵⁹ Finally, the bill defined sexually explicit materials broadly, including those “harmful to minors (as described in

52. IND. CODE §§ 35-50-6-3, -4(a) (2008).

53. 450 U.S. at 35-36. The proper remedy would be to declare the new statute unconstitutional as applied to defendants who commit offenses on or before June 30, 2008. *Id.* at 36 (noting that “severable provisions which are not *ex post facto* may still be applied”).

54. *Doe v. Prosecutor*, 566 F. Supp. 2d 862, 865 (S.D. Ind. 2008).

55. *Id.* at 882.

56. *See id.* at 883.

57. *Id.* This case did not include a challenge to those same restrictions for defendants on probation or parole, and this would be a much steeper hill to climb in light of the diminished liberty interests of probationers and parolees. *See Harris v. State*, 836 N.E.2d 267, 276 (Ind. Ct. App. 2005) (“Restricting a child molester’s access to [the Internet] serves to protect the public and prevent future criminal activity.”).

58. *See Big Hat Books v. Prosecutors*, 565 F. Supp. 2d 981 (S.D. Ind. 2008).

59. *Id.* at 985.

IC 35-49-2-2), even if the product or service is not intended to be used by or offered to a minor.”⁶⁰ The court concluded the bill unduly burdened First Amendment rights and was unconstitutionally vague and overbroad.⁶¹ As to the final point, the court aptly described the overbreadth of the statute’s reach: a “romance novel sold at a drugstore, a magazine offering sex advice in a grocery store checkout line, an R-rated DVD sold by a video rental shop, a collection of old Playboy magazines sold by a widow at a garage sale.”⁶² This reach was found “constitutionally disproportionate to the stated aim of the statute to provide a community ‘heads-up’ upon the opening of ‘adult bookstore-type businesses.’”⁶³

II. SENTENCING APPEALS ON THE DECLINE

Last year’s survey included the caption, “Sentencing: Still the Main Event”⁶⁴—and with good reason. The year was marked by the landmark *Anglemyer* opinion,⁶⁵ which made clear that sentencing statements are still required, and included a variety of other sentencing claims and reductions under Indiana Appellate Rule 7(B).⁶⁶ Although the appellate courts issued scores of sentencing opinions again this year, those numbers appear to be declining and will likely not rebound as plea agreements around the state increasingly include sentencing waivers.⁶⁷

A. *Waiving the Right to Appeal a Sentence*

In *Childress v. State*,⁶⁸ the supreme court made clear that defendants who plead guilty have a right to appeal their sentence if the trial court exercised any discretion.⁶⁹ This included plea agreements with a cap or range of years and even plea agreements that included a set term of years but allowed discretion in where the sentence would be served.⁷⁰ Largely in response to that decision, prosecutors

60. *Id.*

61. *Id.* at 999.

62. *Id.* at 998.

63. *Id.* at 999.

64. Joel M. Schumm, *Recent Developments in Indiana Criminal Law and Procedure*, 41 IND. L. REV. 955, 960 (2008) [hereinafter Schumm I].

65. *Id.* at 962-63 (discussing *Anglemyer v. State*, 868 N.E.2d 482 (Ind. 2007)).

66. *Id.* at 964-73.

67. The numbers may well decline for another reason, which was not resolved during the survey period. In *McCullough v. State*, 888 N.E.2d 1272 (Ind. Ct. App. 2008), *vacated*, 900 N.E.2d 745 (Ind. 2009), a divided court of appeals concluded the State can cross-appeal a sentence as inappropriate when the defendant makes a sentencing challenge on appeal.

68. 848 N.E.2d 1073 (Ind. 2006).

69. *Id.* at 1079.

70. See generally Joel M. Schumm, *Recent Developments in Indiana Criminal Law and Procedure*, 40 IND. L. REV. 789, 799-801 (2007) [hereinafter Schumm II].

began including sentencing waiver provisions in plea agreements.⁷¹ As discussed in last year's survey, the first appellate challenge to a waiver provision proved fruitless, as the court of appeals concluded such agreements are contractual in nature and permissible in federal court.⁷² This survey period, the issue reached the Indiana Supreme Court. In *Creech v. State*,⁷³ the court addressed the propriety and effect of the following provision of a plea agreement:

I understand that I have a right to appeal my sentence if there is an open plea. An open plea is an agreement which leaves my sentence to the Judge's discretion. I hereby waive my right to appeal my sentence so long as the Judge sentences me within the terms of my plea agreement.⁷⁴

The court concluded such provisions are enforceable; defendants may prospectively waive the right to appeal a sentence.⁷⁵ Defendants may later challenge a plea as coerced or unintelligent in a post-conviction proceeding, and a plea agreement may not waive the right to pursue post-conviction relief.⁷⁶ However, trial courts are not required to engage in a colloquy with the defendant to ensure he or she understands a waiver provision but should avoid "confusing remarks" as part of any colloquy.⁷⁷

In *Brattain v. State*,⁷⁸ the court of appeals adhered to *Creech* and reiterated that a colloquy discussing such provisions is not required by the trial court, and the appointment of appellate counsel does not invalidate a waiver provision.⁷⁹ However, in *Clay v. State*,⁸⁰ the court invalidated a waiver provision. There, the defendant pleaded guilty to burglary with a cap of thirty-five years pursuant to a plea agreement that included a provision agreeing to waive "any right to challenge [the] sentence under Indiana Appellate Rule 7."⁸¹ The court of appeals held the provision was not enforceable because the trial court did not confirm the defendant's understanding of that plea provision in a colloquy before accepting the plea agreement.⁸² The court was especially concerned because of the

71. *Id.* at 799.

72. Schumm I, *supra* note 64, at 972 (discussing *Perez v. State*, 866 N.E.2d 817 (Ind. Ct. App. 2007)).

73. 887 N.E.2d 73 (Ind. 2008).

74. *Id.* at 74.

75. *Id.* at 75.

76. *Id.* at 75-76.

77. *Id.* at 76.

78. 891 N.E.2d 1055 (Ind. Ct. App. 2008).

79. *Id.* at 1057. Regardless of the waiver provision, the court concluded the sentence of eight years with four-and-one-half of those years executed for operating a vehicle when the defendant's license was forfeited for life was appropriate in light of the defendant's lengthy history of alcohol- and driving-related offenses. *Id.*

80. 882 N.E.2d 773 (Ind. Ct. App. 2008).

81. *Id.* at 775.

82. *Id.* at 774.

“extensive plea agreement negotiations between the parties.”⁸³

Clay is anomalous among waiver cases, and the vast majority of sentencing waivers will likely not be challenged on appeal or any such challenges will be rejected. As the number of counties using these provisions expands, as it did within weeks after *Creech* was issued, to include large counties that generate most criminal appeals—such as Marion County—the number of sentencing appeals will diminish further. Only defendants who go to trial or plead “open,” i.e., without a plea agreement, will be able to avail themselves of sentencing appeals under Indiana Appellate Rule 7(B). As made clear by the significant number and degree of sentencing reductions discussed below,⁸⁴ however, defense counsel should be very cautious in signing a plea agreement that waives the right to challenge a sentence.

B. Limitations on Consecutive Sentences

An “‘episode of criminal conduct’ means offenses or a connected series of offenses that are closely related in time, place, and circumstance.”⁸⁵ Significant limitations are imposed on consecutive sentences involving non-violent crimes committed as part of the same episode of criminal conduct; the aggregate sentence cannot exceed the advisory term for the next higher class felony.⁸⁶

In *Henson v. State*,⁸⁷ the court of appeals found that two burglaries of neighboring garages committed in the early morning hours of the same day were “‘closely related in time, place, and circumstance’” as required by the statute.⁸⁸ Therefore, the sentence for the two Class C felonies could not exceed ten years (the advisory term for a Class B felony).⁸⁹ However, in *Williams v. State*,⁹⁰ the court found that attacks occurring on separate ends of the Purdue campus, separated by ninety minutes during which the defendant changed his clothes, were not part of the same episode of criminal conduct.⁹¹

Although the statutory provisions on consecutive sentences are usually invoked for the benefit of defendants, *Hardley v. State*⁹² is a notable exception. In *Hardley*, the defendant was charged with theft, released on his own recognizance, and then committed and was charged with additional offenses. The trial court found him guilty of multiple offenses but ordered all counts served concurrently. The court of appeals concluded this was improper, in light of Indiana Code section 35-50-1-2(d): “[i]f, after being arrested for one (1)

83. *Id.* at 776.

84. *See infra* Part II.C.

85. IND. CODE § 35-50-1-2(b) (2008).

86. *Id.* § 35-50-1-2(c).

87. 881 N.E.2d 36 (Ind. Ct. App.), *trans. denied*, 891 N.E.2d 46 (Ind. 2008).

88. *Id.* at 39.

89. *Id.*

90. 889 N.E.2d 1274 (Ind. Ct. App.), *trans. denied*, 898 N.E.2d 1225 (Ind. 2008).

91. *Id.* at 1282.

92. 893 N.E.2d 1140 (Ind. Ct. App. 2008).

crime, a person commits another crime . . . upon the person's own recognizance[,] the terms of imprisonment for the crimes shall be served consecutively, regardless of the order in which the crimes are tried and sentences are imposed."⁹³

Beyond the statutory limitations on consecutive sentences, the supreme court placed further restrictions on the imposition of consecutive sentences. In *Pedraza v. State*,⁹⁴ the court held consecutive sentences may not be imposed when the same conviction is used to elevate one charge and enhance another charge based on the defendant's status as a habitual substance offender.⁹⁵ The court held in *Sweatt v. State*⁹⁶ that the same prior felony may constitute an element of the crime of unlawful possession of a firearm by a serious violent felon (SVF) and also support a finding that the defendant is a habitual offender.⁹⁷ However, if the two convictions occur in the same trial, consecutive sentences cannot be imposed.⁹⁸

C. Substantive Review of Sentences for Appropriateness

Article 7, sections 4 and 6 of the Indiana Constitution, implemented through Indiana Appellate Rule 7(B), provide a defendant the right to challenge the sentence imposed on the grounds that it is "inappropriate in light of the nature of the offense and the character of the offender."⁹⁹ The supreme court has made clear that this provision provides for extensive sentence review "when certain broad conditions are satisfied."¹⁰⁰ As the court of appeals aptly recognized a quarter of a century ago:

We are in as good a position as the trial court to make these determinations based upon the record before us in a proper case. All the material available to the trial court at time of sentencing is equally available to us on appeal. It is contained in the record. Further, the appellate process is uniquely suited to dispassionate consideration of the

93. *Id.* at 1146.

94. 887 N.E.2d 77 (Ind. 2008).

95. *Id.* at 81.

96. 887 N.E.2d 81 (Ind. 2008).

97. *Id.* at 84.

98. *Id.* The court makes no mention in many of these cases of any requirement of an objection by defense counsel at sentencing, and many types of sentencing error do not require an objection to be raised on appeal. The Indiana Supreme Court has explained that both it and the court of appeals review "many claims of sentencing error . . . without insisting that the claim first be presented to the trial judge." *Kincaid v. State*, 837 N.E.2d 1008, 1010 (Ind. 2005). That said, an objection may lead the trial court to fix the problem, and knowing the law on this point will, at a minimum, allow counsel to better advise their client of the exposure in any case.

99. IND. R. APP. P. 7(B).

100. *Neale v. State*, 826 N.E.2d 635, 639 (Ind. 2005); *see also* *Stewart v. State*, 866 N.E.2d 858, 865-66 (Ind. Ct. App. 2007) (observing that, as of May 2007, the Indiana Supreme Court has reduced eleven of twenty-two sentences reviewed under Appellate Rule 7(B) since January 2003).

subject free of the everyday pressures of a trial courtroom.¹⁰¹

More recently, our supreme court has emphasized that the Indiana Constitution authorizes “*independent appellate review*” of a sentence, even when that sentence is imposed pursuant to a plea agreement that provides a cap and “the trial court has been meticulous in following the proper procedure in imposing a sentence.”¹⁰²

Article 7, sections 4 and 6 of the Indiana Constitution were proposed in the 1960s and took effect as constitutional amendments approved by the voters in 1970.¹⁰³ The framers of “these provisions had in mind the sort of sentencing revision conducted by the Court of Criminal Appeals in England.”¹⁰⁴ In England, the appellate court

shall, if they think that a different sentence should have been passed, quash the sentence passed at the trial, and pass such other sentence warranted in law by the verdict (whether more or less severe) in substitution therefor as they think ought to have been passed, and in any other case shall dismiss the appeal.¹⁰⁵

“The Commission’s comments demonstrate that the intent of the Amendment was to expand the role of appellate review, not restrict it.”¹⁰⁶ At the time of the Amendment, the English system included “a complex and coherent body of sentencing principles and policy,” which had been developed to realize the goal of eradicating disparities in the sentences imposed by trial courts.¹⁰⁷

Sentencing principles geared toward eradicating disparities between sentences have been applied in many cases. For example, in reviewing sentences of defendants who plead guilty in England, “the Court of Appeal has formulated the principle that . . . an offender’s remorse, expressed in his plea of guilty, may properly be recognized as a mitigating factor.”¹⁰⁸ The Indiana Supreme Court has taken a similar view, recognizing that an early guilty plea saves the victims from going through a full-blown trial and conserves limited prosecutorial and judicial

101. *Cunningham v. State*, 469 N.E.2d 1, 8 (Ind. Ct. App. 1984).

102. *Childress v. State*, 848 N.E.2d 1073, 1079-80 (Ind. 2006).

103. *See Walker v. State*, 747 N.E.2d 536, 537 (Ind. 2001); *see generally* Article 7, Indiana Constitution, <http://www.in.gov/legislative/ic/code/const/art7.html> (detailing ratification date) (last visited Feb. 4, 2009).

104. *Id.*; *see also Report of the Judicial Study Commission* cmt. at 140 (1966) (“[T]he proposal that the appellate power in criminal cases include the power to review sentences is based on the efficacious use to which the power has been put by the Court of Criminal Appeals in England.”)

105. *Walker*, 747 N.E.2d at 538 (quoting Criminal Appeal Act, 1907, 7 Edward 7, ch. 23 § 4(3)).

106. *King v. State*, 769 N.E.2d 239, 241 (Ind. Ct. App. 2002) (Najam, J., concurring).

107. D.A. Thomas, *Appellate Review of Sentences and the Development of Sentencing Policy: The English Experience*, 20 ALA. L. REV. 193, 194, 197 (1968).

108. *Id.* at 201.

resources; therefore, it is a mitigating circumstance entitled to significant weight.¹⁰⁹

Moreover, the supreme court, consistent with English practice, has taken an especially hard look at consecutive sentences, especially those involving the same victim.¹¹⁰ In England, trial courts also enjoy considerable discretion in imposing concurrent or consecutive sentences, but

the aggregate of the sentences imposed must bear some relationship to the gravity of the individual offences. Even for completely separate offences, it is not permissible to aggregate consecutive sentences so that a total is reached which is far in excess of what would be considered appropriate for the most serious of the individual offences.¹¹¹

In *Serino v. State*, the Indiana Supreme Court built on existing precedent in holding that a 385-year sentence imposed after a jury found the defendant guilty of twenty-six counts inappropriate “where there was one victim, multiple counts . . . , and a lack of criminal history.”¹¹² Although the sentencing statutes allowed for consecutive sentences, the court concluded “there is no escaping that the outcome is at the high end of the sentencing spectrum” and revised the sentence to three presumptive, consecutive terms.¹¹³

With this backdrop in mind, the Survey turns to several cases from the survey period, most of which reduced sentences while relying on principles that can be applied to future cases.¹¹⁴ Principles are not always easy to divine, but the reductions in this year’s cases continue a few noticeable trends.

1. *Indiana Supreme Court*.—In *Reid v. State*,¹¹⁵ the court reviewed a maximum sentence of fifty years for conspiracy to commit murder.¹¹⁶ While incarcerated in a county jail, Reid began discussing with a fellow inmate his desire to have his wife and mother-in-law killed.¹¹⁷ That inmate had snitched on others in the past and did the same with Reid, securing the involvement of an

109. See *Francis v. State*, 817 N.E.2d 235, 238 (Ind. 2004); *Hope v. State*, 834 N.E.2d 713, 719 (Ind. Ct. App. 2005).

110. See, e.g., *Serino v. State*, 798 N.E.2d 852, 857-58 (Ind. 2003).

111. *Thomas*, *supra* note 107, at 203.

112. *Serino*, 798 N.E.2d at 857.

113. *Id.* at 858.

114. Beyond these cases, *King v. State*, 894 N.E.2d 265 (Ind. Ct. App. 2008), offers an important reminder for appellate lawyers. Sentencing challenges may allege trial court error in its sentencing statement, which is reviewed for an abuse of discretion, or may challenge the number of years or placement as inappropriate. *Id.* at 267. As to the latter, appellants must convince the appellate court a sentence is inappropriate in light of the nature of the offense or the character of the offender under Indiana Appellate Rule 7(B). This is an independent review by the appellate court and not reviewed under an abuse of discretion standard. *Id.* at 267-68.

115. 876 N.E.2d 1114 (Ind. 2007).

116. *Id.* at 1115.

117. *Id.*

undercover officer.¹¹⁸ Although the court of appeals affirmed the sentence, the Indiana Supreme Court granted transfer and reduced it to the advisory term of thirty years.¹¹⁹ The court seemed most impressed by Reid's young age (twenty-two) and "that no one was injured, both potential victims pleaded for leniency, and Reid had a history of mental health problems."¹²⁰

In *Smith v. State*,¹²¹ the Indiana Supreme Court reduced a 120-year sentence (four consecutive terms of thirty years) to sixty years (two counts consecutive, two concurrent).¹²² The crimes involved the same victim—the defendant's stepdaughter with whom he had abused a position of trust—and he had previously been convicted of Class D felony child molesting and charged with sexual battery about ten years earlier.¹²³ These aggravating facts were offset by the defendant's poor mental health, which included depression and suicide attempts.¹²⁴

In *Monroe v. State*,¹²⁵ the supreme court reduced a 100-year sentence for five counts of Class A felony child molesting (twenty on each count, served consecutively) to fifty years (the maximum sentence on each count, served concurrently).¹²⁶ The court found the nature of the crimes (repeated molestation over two years) and the defendant's position of trust warranted enhanced sentences, but not consecutive sentences, in light of the defendant's minor criminal history.¹²⁷

The lesson of *Smith*, *Monroe*, and other recent child molest cases involving a single victim is that crimes against a single victim should generally not put a defendant in the century club. Indeed, *Smith* includes a string cite of cases where the court has reduced lengthy consecutive sentences to one or two consecutive terms.¹²⁸

2. *Indiana Court of Appeals*.—In *Williams v. State*,¹²⁹ the court reiterated that "the State may not 'pile on' sentences by postponing prosecution in order to gather more evidence."¹³⁰ Relying on Indiana Appellate Rule 7(B), the court extended those cases requiring concurrent sentences when the State sponsors multiple drug buys to convictions obtained from evidence seized from the

118. *Id.* at 1117.

119. *Id.* at 1116-17.

120. *Id.* The court mentioned that Reid had "amassed a lengthy criminal history" but observed that "many of these offenses were either misdemeanors, occurred while he was a juvenile, or did not result in any physical injuries." *Id.* at 1116.

121. 889 N.E.2d 261 (Ind. 2008).

122. *Id.* at 262.

123. *Id.* at 263-64.

124. *Id.* at 264.

125. 886 N.E.2d 578 (Ind. 2008).

126. *Id.* at 581.

127. *Id.* at 580.

128. *Smith*, 889 N.E.2d at 264-65.

129. 891 N.E.2d 621 (Ind. Ct. App. 2008).

130. *Id.* at 635.

defendant's home within twenty-four hours of the last buy pursuant to a search warrant.¹³¹

In *Feeney v. State*,¹³² the Court of Appeals reduced a forty-year sentence (thirty years at the Department of Correction, four years at community corrections, and six years on supervised probation) for ten counts of burglary to fourteen years (ten years at the Department of Correction, two years on community corrections, and two years on supervised probation).¹³³ Regarding the nature of the offense, the court expressed concern at the sheer number of burglaries but noted that none involved violence or a threat of violence.¹³⁴ More importantly, regarding the character of the offender, the court gave significant weight to the young age of the defendant (eighteen) and his lack of a prior delinquent or criminal history.¹³⁵

In *Kemp v. State*,¹³⁶ the court reduced a thirty-two-year sentence for a church administrator who stole more than \$350,000 from a church over a four-year period.¹³⁷ In reducing the sentence, the court was impressed by the absence of any prior criminal history and the defendant's willingness to plead guilty as charged.¹³⁸ The court directed the trial court "to decide how Kemp should serve those sixteen years, keeping the goal of monetary restitution to the Church in mind."¹³⁹

In *Filice v. State*,¹⁴⁰ the court of appeals reduced a ten-year sentence for Class B felony rape to eight years.¹⁴¹ The court seemed particularly impressed with the lack of any criminal history for the thirty-four-year-old defendant who had been a successful college professor.¹⁴²

In *Westlake v. State*,¹⁴³ the court of appeals cut in half a fourteen-year sentence for Class B felony dealing and Class C felony neglect of a dependent.¹⁴⁴ Although the defendant had been dealing drugs for several months from a home where she lived with her six-year-old son, the court found her offenses

were not a continuation of a related criminal history and her character is unusually and extraordinarily mitigating. The combination of Westlake's previously undiagnosed bipolar disorder, her comprehensive

131. *Id.* at 633-35.

132. 874 N.E.2d 382 (Ind. Ct. App. 2007).

133. *Id.* at 383.

134. *Id.* at 385.

135. *Id.* at 385-86.

136. 887 N.E.2d 102 (Ind. Ct. App. 2008).

137. *Id.* at 105.

138. *Id.* at 106.

139. *Id.*

140. 886 N.E.2d 24 (Ind. Ct. App. 2008).

141. *Id.* at 39-40.

142. *Id.* at 40.

143. 893 N.E.2d 769 (Ind. Ct. App. 2008).

144. *Id.* at 772-73.

response to treatment, and resulting stellar success in Tippecanoe County's excellent pre-conviction program lead us to the conclusion that her sentence is inappropriate.¹⁴⁵

Two years of the seven-year revised sentence were suspended, and the five-year executed term was ordered served on community corrections.¹⁴⁶

Not every defendant who sought a reduced sentence received one. In *Fonner v. State*,¹⁴⁷ a defendant who received the four-year advisory sentence for the Class C felony of operating a vehicle while privileges are forfeited for life did not challenge the length of the sentence but merely challenged the appropriateness of placement in the Department of Correction.¹⁴⁸ Although the location where a sentence is to be served may be challenged under Indiana Appellate Rule 7(B), the court observed "it will be quite difficult for a defendant to prevail on a claim that the placement of his or her sentence is inappropriate."¹⁴⁹ The court correctly observed that "trial courts know the feasibility of alternative placements in particular counties or communities."¹⁵⁰

As *Fonner* suggests, defendants face an uphill battle in arguing that a Department of Correction sentence should be revised to a community corrections placement. A defendant who receives a split sentence between the Department of Correction and community corrections and seeks to reduce the Department of Correction portion of the sentence is less likely to face the same burden because there is no question the defendant qualifies for the alternative placement, as implicit in *Feeney*.¹⁵¹

3. *Conclusion*.—The court takes an especially hard look at consecutive sentences, especially when imposed in a case involving the same victim, such as a child molestation case. Here, the prosecutor has considerable discretion in charging and negotiating a plea, and the supreme court has gone a long way in leveling the field by often limiting sentences to a maximum term for a single count or advisory term for two consecutive counts.¹⁵² As regards the character of the offender, Indiana courts have continued to be impressed by defendants with little or no criminal history, those who plead guilty for their offenses, and

145. *Id.* at 772.

146. *Id.* at 772-73.

147. 876 N.E.2d 340 (Ind. Ct. App. 2007).

148. *Id.* at 343.

149. *Id.*

150. *Id.*

151. See *Feeney v. State*, 874 N.E.2d 382 (Ind. Ct. App. 2007); see also *Davis v. State*, 851 N.E.2d 1264, 1269 (Ind. Ct. App. 2006) (reducing sentence of four years at DOC followed by two years at community corrections to "four years with the time remaining on her sentence to be served through Community Corrections so that she may continue to work to provide for her children and to pay restitution to the victims").

152. *Serino v. State*, 798 N.E.2d 852, 857 (Ind. 2003) (referencing "muscular" charging decisions that may "create the theoretical possibility of very long sentences").

those suffering from a mental illness.¹⁵³ If a defendant falls into two or three of these categories, a maximum or near-maximum sentence is almost certain to be reduced.¹⁵⁴

D. Clarifying Credit Time Confusion: A Marion County Exception

In *Robinson v. State*,¹⁵⁵ the Indiana Supreme Court adopted a presumption that “[s]entencing judgments that report only days spent in pre-sentence confinement and fail to expressly designate credit time earned shall be understood by courts and by the Department of Correction (DOC) automatically to award the number of credit time days equal to the number of pre-sentence confinement days.”¹⁵⁶ The court emphasized that a motion to correct an erroneous sentence may only arise out of information contained on the formal judgment of conviction—and not from an abstract of judgment.¹⁵⁷

In *Neff v. State*,¹⁵⁸ the court carved out an exception for defendants challenging erroneous sentences in Marion County, where trial courts generally issue a DOC abstract and not a written judgment of conviction.¹⁵⁹ “[W]hen a defendant files a motion to correct an erroneous sentence in a county that does not issue judgments of conviction (we are currently aware only of Marion County), the trial court’s abstract of judgment will serve as an appropriate substitute for purposes of making the claim.”¹⁶⁰ Although *Neff* is certainly a necessary and welcome development for litigants in Marion County in the event they seek to challenge their sentence, it seems to give judges in Marion County a free pass to disregard statutes¹⁶¹ or statewide court rules¹⁶² simply because they have a “very high volume of criminal cases.”¹⁶³ One can hope the trend is not extended further—and never in areas where litigants would be disadvantaged as the result of special rules.

Finally, the court also included a helpful explanation of the proper method to calculate the earliest release date from DOC: “When an offender is sentenced and receives credit for time served, earned credit time, or both, that time is applied to the new sentence *immediately*, before application of prospective earned credit time, in order to determine the defendant’s earliest release date.”¹⁶⁴

153. See *supra* notes 115-46 and accompanying text.

154. See *supra* notes 115-46 and accompanying text; accord Schumm I, *supra* note 64, at 968-70.

155. 805 N.E.2d 783 (Ind. 2004).

156. *Id.* at 792.

157. *Id.* at 794.

158. 888 N.E.2d 1249 (Ind. 2008).

159. *Id.* at 1251.

160. *Id.*

161. See, e.g., IND. CODE §§ 35-38-2-3(a), -4(b) (2008).

162. See, e.g., IND. R. CRIM. P. 15.1.

163. *Neff*, 888 N.E.2d at 1251.

164. *Id.*

III. DEVELOPMENTS OUTSIDE THE SENTENCING REALM

Beyond sentencing, published opinions also tackled issues including bail, jury selection, availability of interpreters, Internet crimes against children or police officers posing as children, and probation. This brief survey seeks to explore those issues that have had or are likely to have a significant impact on criminal cases—from beginning to end.

A. A Rare Bail Challenge

Both the Eighth Amendment to the U.S. Constitution and article 1, section 17 of the Indiana Constitution impose significant limitations on the setting of bail.¹⁶⁵ “Bail set at a figure higher than an amount reasonably calculated” to assure the presence of the accused “is ‘excessive’ under the Eighth Amendment.”¹⁶⁶ Fixing the amount of bail in each case “must be based upon standards relevant to the purpose of assuring the presence of that defendant.”¹⁶⁷ The Indiana Constitution expressly provides a right to bail “by sufficient sureties.”¹⁶⁸ This right is more expansive than that provided by the United States Constitution.¹⁶⁹ “The law confines the use of pre-trial detention to only one end—namely, that the criminal defendant be present for trial. This limitation is implicit in the concept of bail.”¹⁷⁰ Pretrial incarceration cannot be punitive, and accused persons are presumed innocent.¹⁷¹

Indiana Code section 35-33-8-4(b) lists several factors to be considered in setting bail.¹⁷² A bail matrix or bail schedule, which are widely used in counties across the state, will seldom track these. In *Samm v. State*,¹⁷³ the court of appeals reiterated “[p]aramount considerations convince us that bail should be tailored to the individual in each circumstance. Bond schedules should serve only as a starting point for such considerations.”¹⁷⁴ Although the defendant submitted evidence on several of the statutory factors, the trial court relied primarily on the number of charges pending.¹⁷⁵ By “failing to acknowledge uncontroverted evidence on several” statutory factors, the trial court was held to have abused its

165. See U.S. CONST. amend. VIII; IND. CONST. art. 1, § 17.

166. *Stack v. Boyle*, 342 U.S. 1, 5 (1951).

167. *Id.*; accord *Hobbs v. Lindsey*, 162 N.E.2d 85, 88 (Ind. 1959) (“[T]he principal purpose of bail is the assurance of the accused party’s presence in court ‘[B]ail set at a figure higher than an amount reasonably calculated to fulfill this purpose is ‘excessive’’”) (quoting *Boyle*, 342 U.S. at 3).

168. IND. CONST. art. 1 § 17.

169. *Ray v. State*, 679 N.E.2d 1364, 1366 (Ind. Ct. App. 1997); cf. U.S. CONST. amend. VIII.

170. *Brown v. State*, 322 N.E.2d 708, 712 (Ind. 1975) (citing IND. CONST. art. 1, § 17).

171. *Sherelis v. State*, 452 N.E.2d 411, 413 (Ind. Ct. App. 1983).

172. See IND. CODE § 35-33-8-4(b) (2008).

173. 893 N.E.2d 761 (Ind. Ct. App. 2008).

174. *Id.* at 766.

175. *Id.* at 768.

discretion.¹⁷⁶

Counsel should be sure to make a record in a bail hearing that is grounded in the factors listed in Indiana Code section 35-33-8-4(b). Bail determinations are final, appealable judgments.¹⁷⁷ Rarely, however, do bail challenges make it to the court of appeals or supreme court. The standard timeline for record preparation and briefing generally takes more than six months,¹⁷⁸ and most cases go to trial in less time, making any challenge to bail moot. Moreover, seeking an expedited appeal is important to avoid a finding of mootness, although the court of appeals held in *Samm* that an exception to the mootness doctrine applied.¹⁷⁹

Bail schedules are especially problematic for indigent defendants. The ultimate and salient determination is a binary one: Will the defendant be free on bail pending trial or remain incarcerated? Many indigent defendants can post no or very little bail money; therefore, it is especially important to give weight to the statutory factors of “ability to give bail” and “the source of funds or property to be used to post bail” to avoid jails filled with poor people charged with minor crimes.¹⁸⁰ Incarcerating such defendants, absent a showing they are not likely to appear in court, runs afoul not only of the presumption of innocence but also the constitutional guarantee of equal protection.¹⁸¹ “In criminal trials a State can no more discriminate on account of poverty than on account of religion, race, or color. Plainly the ability to pay costs in advance bears no rational relationship to a defendant’s guilt or innocence”¹⁸²

Finally, questions will likely surface in future cases as to the specific contours of the right to bail. The constitutional right to bail and statutory considerations do not specify a time limit for their enforcement, and it is often several hours or possibly one or more days before a judicial officer can review

176. *Id.* Although bail schedules are used in many counties, the Vanderburgh County local rule, for example, appropriately provides that “[t]he Court shall consider factors found in IC 35-33-8-4 in setting appropriate bond in all cases.” VANDERBURGH CIRCUIT AND SUPERIOR COURT R. LR82-CR00-2.03(A), available at <http://www.in.gov/judiciary/localrules/current/vanderburgh-all-111208.pdf> (last visited Feb. 4, 2009).

177. *Bradley v. State*, 649 N.E.2d 100, 106 (Ind. 1995) (“The denial of bail is deemed a final judgment appealable immediately, without waiting for the final judgment following trial.”).

178. The Indiana Rules of Appellate Procedure provide the court reporter ninety days after the filing of the Notice of Appeal to prepare the transcript, which generally must be completed before the Appellant can begin working on his brief, which is due thirty days later. IND. R. APP. P. 11(B), 45(B). The Appellee then has thirty days to file its brief, before the Appellant has another fifteen days to file a reply brief under Rule 45(B). IND. R. APP. P. 45(B). The court of appeals then needs at least a few weeks, if not months, to issue a written opinion.

179. *Samm*, 893 N.E.2d at 765. Moreover, the court of appeals has previously decided, long after conviction, challenges involving bail issues without any mention of mootness. *See, e.g.*, *Traylor v. State*, 817 N.E.2d 611, 625 (Ind. Ct. App. 2004); *Wertz v. State*, 771 N.E.2d 677, 680-82 (Ind. Ct. App. 2002).

180. IND. CODE § 35-33-8-4(b) (2008).

181. U.S. CONST. amend. XIV.

182. *Griffin v. Illinois*, 351 U.S. 12, 17-18 (1956).

bail. New statutes put restrictions on setting bail for persons charged with domestic violence¹⁸³ and certain sex offenders.¹⁸⁴

B. Jury Selection: The Batson Door Swings Both Ways

Many lawyers think of *Batson v. Kentucky*¹⁸⁵ as prohibiting prosecutors from striking all African-American jurors, but Indiana cases make clear the *Batson* Rule is much broader. “[T]he Constitution prohibits a criminal defendant from engaging in purposeful discrimination on the ground of race in the exercise of peremptory challenges.”¹⁸⁶ The following analysis then applies:

First, the party contesting the peremptory challenge must make a prima facie showing of discrimination on the basis of race. Second, after the contesting party makes a prima facie showing of discrimination, the burden shifts to the party exercising its peremptory challenge to present a race-neutral explanation for using the challenge. Third, if a race-neutral explanation is proffered, the trial court must then decide whether the challenger has carried its burden of proving purposeful discrimination.¹⁸⁷

In *Jeter v. State* defense counsel offered three race-neutral reasons for striking a white juror: “(1) the juror’s father was a police officer; (2) his grandfather had been a local attorney and judge of a municipal court; and (3) the juror responded ‘I guess not’ when asked if he could think of any murders that were not suitable for the death penalty.”¹⁸⁸ However, the trial court did not believe the stated explanation for challenging the juror and refused to allow the use of a peremptory challenge.¹⁸⁹ At the time defense counsel “moved to strike the juror, he had previously used his first nine peremptory challenges to exclude whites from the jury, especially white males. As a consequence, of the ten seated

183. A new statute requiring a “cooling off” period of eight hours before a court may release a person arrested for a crime of domestic violence seems immune from attack. See IND. CODE §§ 35-33-1-1.7 (discussing the duty of facilities), 35-33-8-6.5 (2008) (discussing court’s duties).

184. During the 2008 session the General Assembly added Indiana Code section 35-33-8-3.5 to place restrictions on bail for persons charged with a sex or violent offense who are sexually violent predators under Indiana Code section 35-38-1-7.5. No bail is permitted under a bail hearing held within forty-eight hours of arrest. Although there seems to be little basis on which to challenge such a restriction for a recidivist sexual offender, language in the statute suggests it could also be applied simply to someone arrested for child molesting or child solicitation, regardless of prior status. This would appear to conflict with the constitutional right to bail and general bail statute, although the question remains whether being held without bail for forty-eight hours is an unconstitutional denial of bail (as opposed to a permissible delay in setting bail).

185. 476 U.S. 79 (1986).

186. *Georgia v. McCollum*, 505 U.S. 42, 59 (1992).

187. *Jeter v. State*, 888 N.E.2d 1257, 1263 (Ind. 2008) (citing *Batson*, 476 U.S. at 96-97).

188. *Id.* at 1264.

189. *Id.*

jurors, none were white males.”¹⁹⁰ Based on this, the supreme court concluded the trial court’s ruling was not clearly erroneous.¹⁹¹

This case underscores that trial judges have considerable discretion in deciding whether to accept or reject the reasons for a challenge. Trial courts can reject the reasons given by the State when defendants raise a *Batson* challenge, although such rulings are unlikely to be appealed.¹⁹²

C. “Reasonable” Parental and Teacher Discipline

In *Willis v. State*,¹⁹³ the Indiana Supreme Court set aside a mother’s conviction for battery of her child based on the theory of reasonable parental discipline.¹⁹⁴ “To sustain a conviction for battery where a claim of parental privilege has been asserted, the State must prove that either: (1) the force the parent used was unreasonable or (2) the parent’s belief that such force was necessary to control her child and prevent misconduct was unreasonable.”¹⁹⁵ The court adopted the Restatement (Second) of Torts view: “A parent is privileged to apply such reasonable force or to impose such reasonable confinement upon his [or her] child as he [or she] reasonably believes to be necessary for its proper control, training, or education.”¹⁹⁶ The following non-exhaustive factors should be weighed:

- (a) whether the actor is a parent;
- (b) the age, sex, and physical and mental condition of the child;
- (c) the nature of his offense and his apparent motive;
- (d) the influence of his example upon other children of the same family or group;
- (e) whether the force or confinement is reasonably necessary and appropriate to compel obedience to a proper command;
- (f) whether it is disproportionate to the offense, unnecessarily degrading, or likely to cause serious or permanent harm.¹⁹⁷

In *Willis*, the child was eleven, and the court reasoned more severe discipline is appropriate for older children than younger ones.¹⁹⁸ The child had taken his mother’s clothes to school, sold them, and then lied about it, which the court found to be serious, especially because it was part of a pattern of similar

190. *Id.* at 1265.

191. *Id.*

192. *See generally* IND. CODE § 35-38-2(4) (2008) (providing the State the right to appeal a reserved question of law, which is seldom exercised).

193. 888 N.E.2d 177 (Ind. 2008).

194. *Id.* at 184.

195. *Id.* at 182.

196. *Id.* (quoting and adopting RESTATEMENT (SECOND) OF TORTS § 147(1) (1965)).

197. *Id.*

198. *Id.* at 183.

behavior.¹⁹⁹ The mother had unsuccessfully tried progressive forms of discipline, such as grounding the child or withholding privileges, and considered the appropriate punishment for two days before the spanking.²⁰⁰ The court concluded the five to seven swats on the buttocks, arm, and thigh with a belt or extension cord was not unreasonable, as it left only mild, temporary bruising the next day and did not require medical attention.²⁰¹

The Indiana Court of Appeals had its first opportunity to apply *Willis* in *Matthew v. State*.²⁰² There, a mother struck a rebellious twelve year old with a closed fist and belt downstairs and then followed the child upstairs after he escaped.²⁰³ Although the child had been verbally warned about his behavior and no permanent injuries resulted, the court upheld the conviction.²⁰⁴ Chief Judge Baker dissented, finding the facts remarkably similar to *Willis*: the child was twelve years old, just one year older than the child in *Willis*, and progressive discipline had been employed. Chief Judge Baker thus believed ten blows with a hand and belt were not excessive.²⁰⁵

These cases are exceedingly fact sensitive, and the great amount of deference given factfinders seems somewhat diminished in *Willis*.²⁰⁶ In light of that case, defendant may seek to have the case dismissed as a matter of law through a pretrial motion to dismiss to avoid a trial.²⁰⁷ If the cases go to trial, the Restatement factors would seem helpful to a jury through an instruction, although the trend of the Indiana Supreme Court has been moving away from including language from appellate opinions in jury instructions.²⁰⁸ Legislative action may occur as well. As an Associated Press editorial put it, “In a state that has a serious problem with violence against children, let us hope that a 4-1 decision by the Indiana Supreme Court did nothing to dissuade concerned observers from getting involved.”²⁰⁹

The court of appeals also sanctioned physical contact as part of reasonable teacher discipline. In *State v. Fettig*,²¹⁰ the court upheld the dismissal of a battery

199. *Id.*

200. *Id.*

201. *Id.* at 183-84.

202. 892 N.E.2d 695 (Ind. Ct. App. 2008).

203. *Id.* at 696-97.

204. *Id.* at 699.

205. *Id.* at 701 (Baker, C.J., dissenting).

206. *Id.* at 701-02 (Baker, C.J., dissenting) (“Here—and in *Willis*—the factfinder concluded that the respective mothers' actions went beyond the boundary of reasonableness, and I am uncomfortable with an appellate court second-guessing that conclusion as a matter of law. That said, it is evident that our Supreme Court has instructed us to do precisely that . . .”).

207. *Cf. State v. Fettig*, 884 N.E.2d 341 (Ind. Ct. App. 2008).

208. See generally Joel M. Schumm, *Recent Developments in Indiana Criminal Law and Procedure*, 37 IND. L. REV. 1003, 1010-11 (2004) [hereinafter Schumm III].

209. *Children at Risk*, EVANSVILLE COURIER & PRESS, June 30, 2008, available at <http://www.courierpress.com/news/2008/jun/30/indiana-editorial-by-the-associated-press/>.

210. 884 N.E.2d 341 (Ind. Ct. App. 2008).

charge against a teacher who disciplined a student by grabbing her chin, which involved “no weapons, no closed fist, no repeated blows, no verbal abuse, and the only alleged injury being a stinging sensation.”²¹¹ It relied on cases from the 1800s, which provoked a dissent that noted the “world has changed greatly since that time” and the whipping allowed in those cases would probably not be allowed today.²¹²

D. Confrontation Clause

In *State v. Martin*,²¹³ the court of appeals held the trial court erred in finding pretrial statements made by a domestic violence victim testimonial and therefore inadmissible.²¹⁴ The statements were made minutes after police responded to a 911 call of a woman with blood coming from her mouth running from a vehicle.²¹⁵ The woman told police her boyfriend had struck her in the face in the car and then had driven off with her children.²¹⁶ She did not testify at trial, and the State sought to admit her statements to police.²¹⁷ Under *Davis v. Washington*,²¹⁸ the key inquiry is whether the statements were testimonial:

Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.²¹⁹

The court in *Martin* found the statements made by the victim were not testimonial because (1) the declarant was describing events as they were actually happening, instead of past events; (2) the declarant was facing an ongoing emergency; (3) the nature of the police inquiry elicited statements necessary to be able to resolve the present emergency rather than simply to learn about past events; and (4) the lack of formality of the interview.²²⁰

The farther reaching issue brewing around the Confrontation Clause is whether a forensic analyst’s lab report prepared for use in criminal prosecution is testimonial and therefore subject to cross-examination under the Sixth

211. *Id.* at 346.

212. *Id.* at 347 (Kirsch, J., dissenting).

213. 885 N.E.2d 18 (Ind. Ct. App. 2008).

214. *Id.* at 21.

215. *Id.* at 19.

216. *Id.*

217. *Id.*

218. 547 U.S. 813 (2006).

219. *Id.* at 822.

220. *Martin*, 885 N.E.2d at 20-21.

Amendment.²²¹ The Indiana Court of Appeals has issued seemingly contradictory opinions,²²² and the matter is pending before the Indiana Supreme Court.

E. No New Oath Required for Officers

The biggest non-issue of the survey period is one that generated significant media attention. The Indianapolis Metropolitan Police Department (IMPD) was created by statute and local ordinance to assume law enforcement responsibilities for Marion County beginning January 1, 2007.²²³ It replaced the Indianapolis Police Department (IPD) and Marion County Sheriff Department (MCSD).²²⁴ A defendant arrested by IMPD officers challenged her arrest in 2007 on the grounds that the arresting officer, although sworn as an IPD or MCSD officer, had not been re-sworn as an IMPD officer.²²⁵ The challenge was grounded in large part in the statutory requirement that all law enforcement officers take an oath before assuming their official duties.²²⁶ Most judges quickly rejected such challenges, but one judge granted the defendant's motion to suppress all evidence from her traffic stop and sua sponte dismissed the case, concluding the arresting officer was not authorized by statute or the constitution to enforce the laws of Indiana.²²⁷ The Indiana Supreme Court reversed, noting that the statute did not "impose any additional requirements on officers, such as passing a new examination or re-swearing," and the ordinance "declared that all members of the IPD and MCSD

221. Petition for Writ of Certiorari at 9, *Melendez-Diaz v. Massachusetts*, No. 07-591, 2007 WL 3252033 (U.S. Oct. 26, 2007) (petition granted, 128 S. Ct. 1647 (2008)).

222. In *Pendergrass v. State*, 889 N.E.2d 861 (Ind. Ct. App.), *vacated by* 898 N.E.2d 1219 (Ind. 2008), the court of appeals addressed the admissibility of "test results" from DNA analysis offered through the supervisor of the technician who performed the analysis and prepared the report. The court rejected a *Crawford v. Washington*, 541 U.S. 36 (2004), challenge because "the Confrontation Clause does not apply to statements admitted for reasons other than proving the truth of the matter asserted" and the court found the exhibits were not offered to prove molestation but rather "merely provided context" for the expert's opinion. *Id.* at 869. Weeks later, in *Jackson v. State*, 891 N.E.2d 657 (Ind. Ct. App. 2008), another panel of the court of appeals found a Sixth Amendment Confrontation Clause violation when the trial court admitted a lab report prepared by a technician who did not testify at trial. The court sided with those courts which have found such reports testimonial on the grounds that they are (1) created by a law enforcement agency (2) for the prosecution (3) for the sole purpose of proving an element of a charged crime. *Id.* at 661. The ability to cross-examine the technician's supervisor is not a sufficient substitute for the right to confront and cross-examine the technician—nor does the business record exception salvage the testimony. *Id.* at 662.

223. *State v. Oddi-Smith*, 878 N.E.2d 1245, 1247 (Ind. 2008).

224. *Id.*

225. *Id.*

226. *Id.* at 1247-48 (citing IND. CODE § 5-4-1-1(a) (2006)).

227. *Id.* at 1247.

automatically became members of the IMPD.”²²⁸ The court concluded “the arresting officer was recruited, trained, and sworn as an IPD officer and that he took all that with him to the IMPD.”²²⁹ The suppression and dismissal were reversed, and the case was remanded for a trial on the merits.²³⁰

F. Non-Indigent Defendants: BYOT (Bring Your Own Translator)

In *Arrieta v. State*,²³¹ the Indiana Supreme Court provided a thorough review of the history and procedures for use of interpreters in Indiana courts.²³² It reiterated that indigent defendants are entitled to interpreters at public expense both for the proceedings and for the defendant.²³³ When a defendant is not indigent, however, the court crafted a different rule. The court first held that “proceedings interpreters,” or those who translate non-English testimony from the witness stand, must be provided at public expense.²³⁴ “Just as a trial cannot proceed without a judge or bailiff, an English-speaking court cannot consider non-English testimony without an interpreter.”²³⁵ However, the court differentiated solvent defendants by stating they are not entitled to “defense interpreters”—those who interpret the trial for the defendant and help him communicate with his lawyer—at public expense, just as a solvent defendant is not entitled to court-appointed counsel.²³⁶

Although *Arrieta* sets a clear rule for these two types of interpreters, it does not provide much guidance to trial courts in deciding whether a defendant is financially able to hire an interpreter. Rather, it simply concludes that *Arrieta*, who posted a \$50,000 bond and hired his own lawyer, was required to “present evidence contradicting his ability to pay for a defense interpreter.”²³⁷ In future cases, the trial court must make an indigency determination, just as it does for counsel, “based on a thorough examination of the defendant’s total financial picture as is practical, and not on a superficial examination of income and ownership of property.”²³⁸

In *Gado v. State*,²³⁹ the court of appeals confronted a different set of circumstances but nevertheless upheld the denial of an interpreter.²⁴⁰ Although

228. *Id.* at 1248-49.

229. *Id.* at 1249.

230. *Id.*

231. 878 N.E.2d 1238 (Ind. 2008).

232. *Id.* at 1240-44.

233. *Id.* at 1232-44.

234. *Id.* at 1245.

235. *Id.*

236. *Id.*

237. *Id.*

238. *Id.* at 1245 n.10 (internal quotation marks omitted) (quoting *Lamonte v. State*, 839 N.E.2d 172, 176-77 (Ind. Ct. App. 2005)).

239. 882 N.E.2d 827 (Ind. Ct. App.), *trans. denied*, 891 N.E.2d 49 (Ind. 2008).

240. *Id.* at 831.

the defendant sought an interpreter of Djerma, a rare language for which it is difficult to find interpreters, the court had interacted with the defendant in English several times and relied on evidence that the defendant had previously conversed with a witness many times in English.²⁴¹

G. Online Child Solicitation and Attempted Sexual Misconduct

Millions of television viewers have become accustomed to seeing online chats with would-be children end with the suspect appearing at a house to meet *To Catch a Predator* host Chris Hansen.²⁴² However, what if an adult engages in a sexually charged online chat with an officer pretending to be a child online but never sets up a meeting? In *Kuypers v. State*,²⁴³ the court of appeals made clear “[n]either a meeting nor an immediate request [to meet] is necessary to complete the crime of child solicitation because it is the mere exposure of children to such solicitations that the statute seeks to avoid.”²⁴⁴ *Kuypers* addressed only a challenge to the sufficiency of the evidence and focused on the statutory definition of the term “solicit,” which means “to command, authorize, urge, incite, request, or advise an individual” to engage in a sex act.²⁴⁵ *Kuypers* seemingly gives the green light to law enforcement officers and prosecutors to obtain records from Internet service providers to track down those who engage in such sexually charged chats. Based on these records, law enforcement may then secure a warrant to search suspects’ computers, if not arrest them.²⁴⁶

In *Aplin v. State*,²⁴⁷ the court reversed a conviction for attempted sexual misconduct with a minor that resulted from a man chatting with a detective pretending to be a fifteen-year-old girl (“glitterkatie2010”) online and then driving to an arranged meeting for a sexual encounter.²⁴⁸ Although the court affirmed the child solicitation conviction, “whereby the State need not prove the actual age of the victim but may prove the solicitor’s belief that the solicitee is a minor,”²⁴⁹ sexual misconduct with a minor requires an actual minor aged fourteen or fifteen—not an adult pretending to be a child.²⁵⁰ The problem with

241. *Id.*

242. See generally Brian Stelter, “*To Catch a Predator*” Is Falling Prey to Advertisers’ Sensibilities, N.Y. TIMES, Aug. 27, 2007, at C1.

243. 878 N.E.2d 896 (Ind. Ct. App.), *trans. denied*, 891 N.E.2d 42 (Ind. 2008).

244. *Id.* at 899 (internal quotations omitted).

245. *Id.* at 898 (quoting IND. CODE § 35-42-4-6(a) (2006)).

246. No claim was raised about the possible vagueness of this statute, i.e., whether the statute defines the offense with “sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.” *Healthscript v. State*, 770 N.E.2d 810, 815-16 (Ind. 2002) (quoting *Kolender v. Lawson*, 461 U.S. 352, 357 (1983)).

247. 889 N.E.2d 882 (Ind. Ct. App.), *trans. denied*, 898 N.E.2d 1231 (Ind. 2008).

248. *Id.* at 883.

249. *Id.* at 884-85.

250. *Id.* at 884. Any future attempted sexual misconduct or attempted child molest

using mere speech as a substantial step for a crime was aptly summarized in a recent opinion from Judge Posner of the Seventh Circuit:

Treating speech . . . as the “substantial step” would abolish any requirement of a substantial step. It would imply that if X says to Y, “I’m planning to rob a bank,” X has committed the crime of attempted bank robbery, even though X says such things often and never acts. The requirement of proving a substantial step serves to distinguish people who pose real threats from those who are all hot air; in the case of Gladish, hot air is all the record shows.²⁵¹

H. Crime or Not a Crime?

Challenges to the sufficiency of the evidence are generally regarded as a losing cause. If a jury or judge finds a defendant guilty, the standard of review for reversing the conviction is a high hurdle to clear.²⁵² As the following cases demonstrate, though, Indiana’s appellate courts do reverse convictions based on insufficient evidence. This often occurs in opinions that are written in ways that suggest the issue is a legal one with broader applicability than the facts of the particular case.

In *Henley v. State*,²⁵³ the supreme court found insufficient evidence to uphold

prosecutions could presumably be dismissed based on *Aplin* and prior case law if: (1) no victim under sixteen is involved or (2) the defendant merely drives to a meeting point, because driving to meet is not a substantial step. In *State v. Kemp*, 753 N.E.2d 47 (Ind. Ct. App. 2001), the court of appeals concluded:

[T]he State alleged in its charging information that Kemp had committed a substantial step toward the offense of child molesting when he agreed to meet “Brittney4u2” at a restaurant parking lot, drove there, and brought some condoms with him. Under these circumstances, we observe that the facts alleged in the information do not reach the level of an overt act leading to the commission of child molesting. At most, such allegations only reach the level of preparing or planning to commit an offense. Were we to conclude otherwise, there would be no limit on the reach of “attempt” crimes. As a result, we conclude that the trial court properly granted Kemp’s motion to dismiss the two child molesting counts.

Id. at 51 (citation omitted).

251. *United States v. Gladish*, 536 F.3d 646, 650 (7th Cir. 2008).

252. *See generally* *McHenry v. State*, 820 N.E.2d 124, 126 (Ind. 2005) (“Upon a challenge to the sufficiency of evidence to support a conviction, a reviewing court does not reweigh the evidence or judge the credibility of the witnesses, and respects ‘the jury’s exclusive province to weigh conflicting evidence.’ We have often emphasized that appellate courts must consider only the probative evidence and reasonable inferences supporting the verdict. Expressed another way, we have stated that appellate courts must affirm ‘if the probative evidence and reasonable inferences drawn from the evidence could have allowed a reasonable trier of fact to find the defendant guilty beyond a reasonable doubt.’”) (footnotes omitted).

253. 881 N.E.2d 639 (Ind. 2008).

an attempted murder conviction.²⁵⁴ In *Henley*, the defendant fired his gun in the dark toward a large dog he believed was attacking him. There was no evidence that he was pointing his firearm at a police officer when he fired it.²⁵⁵ The court included a helpful string cite of distinguishable cases where evidence of attempted murder has been found sufficient:

Shelton v. State, 602 N.E.2d 1017, 1021 (Ind. 1992) (Defendant pointed handgun at victim and shot him twice from a distance of twelve and thirty feet.); *Davis v. State*, 558 N.E.2d 811, 811 (Ind. 1990) (Defendant ran from police, turned, and fired a shot which struck an automobile directly behind the police officer.); *Parks v. State*, 513 N.E.2d 170, 171 (Ind. 1987) (Defendant pointed a loaded shotgun at the officer's midsection and said, "You're dead."); *Brumbaugh v. State*, 491 N.E.2d 983, 984 (Ind. 1986) (Defendant fired a shotgun at a police helicopter and an officer testified that a shot "whizzed" by his head.); *Conley v. State*, 445 N.E.2d 103, 105 (Ind. 1983) (Defendant fired at police officer striking the radiator of the patrol car that acted as shield.).²⁵⁶

In *A.B. v. State*,²⁵⁷ the supreme court vacated several harassment adjudications against a juvenile who posted derogatory statements about a middle school principal.²⁵⁸ Three adjudications were vacated because the messages were part of a "private profile" site, viewable only by those users accepted as "friends."²⁵⁹ The principal gained access to the site only through a student during his investigation. Therefore, there was no evidence the respondent expected the principal to see the messages on the private site.²⁶⁰ Although other comments were posted on a "group" page, the court found insufficient proof of "no intent of legitimate communication" because the messages merely criticized the principal's earlier disciplinary action.²⁶¹

In *Scruggs v. State*,²⁶² the court of appeals reversed a conviction for neglect of a dependent based on evidence that a mother left her seven-year-old son at home alone for as long as three hours while running an errand.²⁶³ The court reiterated that a neglect conviction requires exposing a child to an actual and appreciable danger to life or health.²⁶⁴ Although the defendant may have demonstrated "bad judgment," the State did not prove a "subjective awareness

254. *Id.* at 652-53.

255. *Id.* at 652.

256. *Id.* at 653.

257. 885 N.E.2d 1223 (Ind. 2008).

258. *Id.* at 1228.

259. *Id.* at 1227.

260. *Id.*

261. *Id.*

262. 883 N.E.2d 189 (Ind. Ct. App.), *trans. denied*, 898 N.E.2d 1221 (Ind. 2008).

263. *Id.* at 191.

264. *Id.*

of a high probability that she had placed [the child] in a dangerous situation.”²⁶⁵

Under Indiana law, stalking requires that a defendant (1) knowingly or intentionally (2) engaged in a course of conduct involving repeated or continuing harassment of the victim, (3) that would cause a reasonable person to feel terrorized, frightened, intimidated, or threatened, and (4) that actually caused the victim to feel terrorized, frightened, intimidated, or threatened.²⁶⁶ Stalking does not include statutorily or constitutionally protected activity.²⁶⁷ In *VanHorn v. State*,²⁶⁸ the charged conduct was merely parking near the victim’s house on four separate occasions and looking at the victim’s house through binoculars on two of those occasions.²⁶⁹ In finding insufficient evidence, the court emphasized the due process right to be on a public street and focused on the absence of a protective order, which would have given the defendant notice that his conduct was impermissible.²⁷⁰

In *Bell v. State*,²⁷¹ the court of appeals reduced three counts of Class A felony dealing to Class B felonies based on Indiana Code section 35-48-4-16(c).²⁷² That statute creates a defense when a defendant charged with a drug offense is within 1,000 feet of a park or other location “at the request or suggestion of . . . an agent of a law enforcement officer.”²⁷³ In *Bell*, detectives directed a confidential informant (CI) to call the defendant to arrange to purchase drugs.²⁷⁴ The CI asked the defendant to come to his apartment, which was across the street from a park. The court rejected the State’s argument that the defendant “was free to drive to another location to conduct the drug deal” and that there was no evidence he was “tricked” into selling drugs within 1,000 feet of a park.²⁷⁵

Public intoxication convictions have long been upheld against drunk passengers in vehicles on *public* roads. Not surprisingly, in *Jones v. State*,²⁷⁶ the court of appeals reversed a public intoxication conviction against a woman who was sitting in a vehicle parked on private property; no one saw her in an intoxicated state in a public place.²⁷⁷ In a footnote, however, the court questioned

whether it serves the purpose of the statute to convict persons of public intoxication who are passengers in a private vehicle traveling on a public road It also is difficult to perceive the public policy behind

265. *Id.*

266. IND. CODE § 35-45-10-1 (2008).

267. *Id.*

268. 889 N.E.2d 908 (Ind. Ct. App.), *trans. denied*, 898 N.E.2d 1225 (Ind. 2008).

269. *Id.* at 911.

270. *Id.* at 912-14.

271. 881 N.E.2d 1080 (Ind. Ct. App.), *trans. denied*, 891 N.E.2d 48 (Ind. 2008).

272. *Id.* at 1086-88.

273. *Id.* at 1086 (quoting IND. CODE § 35-48-4-16(c) (2006)).

274. *Id.*

275. *Id.* at 1086-87.

276. 881 N.E.2d 1095 (Ind. Ct. App. 2008).

277. *Id.* at 1098.

criminalizing riding in (as opposed to driving) a private vehicle in a state of intoxication. In fact, perhaps the better public policy would be to encourage persons who find themselves intoxicated to ride in a vehicle to a private place without fear of being prosecuted for a crime.²⁷⁸

Although dicta, the footnote in *Jones* provides a strong argument for an intoxicated passenger to challenge a public intoxication conviction in the future.

In other cases, however, the court found sufficient evidence in opinions that could apply fairly broadly beyond the narrow facts of the cases. In *Nash v. State*,²⁷⁹ an HIV-positive inmate threw a cup of his urine and excrement at a nurse who was passing by his cell; it landed on her shoes.²⁸⁰ He was charged with battery by body waste, which requires placing body fluid or waste on a “corrections officer.”²⁸¹ Indiana Code section 35-42-2-6(a) defines a “corrections officer” to include “persons employed by (1) the department of correction; (2) a law enforcement agency; (3) a probation department; (4) a county jail; or (5) a circuit, superior, county, probate, city, or town court.”²⁸² Although the nurse was employed by a staffing agency and not the DOC, the court nevertheless upheld the conviction based on who it believed the legislature “intended” to protect.²⁸³

In *Zitlaw v. State*,²⁸⁴ the court of appeals addressed several challenges to a charge of performance harmful to minors. Indiana Code section 35-49-3-3(5) criminalizes “engag[ing] in or conduct[ing] a performance that is harmful to minors in an area to which minors have visual, auditory, or physical access, unless each minor is accompanied by the minor’s parent or guardian.”²⁸⁵ The offense is a Class D felony, but there is very little case law about it.

The court of appeals’s majority in the 2-1 decision affirmed the denial of the motion to dismiss.²⁸⁶ The court reasoned the statute merely requires that children have “access” to the area; there need not be actual children anywhere nearby.²⁸⁷ Judge Riley dissented, believing that the statute requires “the actual presence of

278. *Id.* at 1098 n.2.

279. 881 N.E.2d 1060 (Ind. Ct. App.), *trans. denied*, 891 N.E.2d 49 (Ind. 2008).

280. *Id.* at 1062.

281. *Id.* (citing IND. CODE § 35-42-2-6(a), (e) (2008)).

282. IND. CODE § 35-42-2-6(a) (2008).

283. *Nash*, 881 N.E.2d at 1063-64. *Nash* seems to conflict with Indiana Supreme Court precedent, which has emphasized that penal statutes must be strictly construed against the State. For example, the court recently held that a bus driver working as an independent contractor for a school was not a “child care worker” under the child seduction statute. *Smith v. State*, 867 N.E.2d 1286, 1287-89 (Ind. 2007) (“A long-cherished principle of the American justice system is that a citizen may not be prosecuted for a crime without clearly falling within the statutory language defining the crime.”).

284. 880 N.E.2d 724 (Ind. Ct. App.), *trans. denied*, 891 N.E.2d 45 (Ind. 2008). This author was co-counsel for Mr. Zitlaw on appeal.

285. IND. CODE § 35-49-3-3(5) (2006).

286. *Zitlaw*, 880 N.E.2d at 732.

287. *Id.*

minors” and therefore any information would need to allege the name of at least one minor who saw or heard the performance and was unaccompanied by a parent or guardian.²⁸⁸ She also expressed concern that, for example, a married couple having sex in a tent in the wilderness could be prosecuted under the majority’s interpretation.²⁸⁹

The court of appeals’s interpretation wholly writes the term “minor”—in its many uses—out of the statute. Although one part of the statute mentions areas where minors have “access,” several other parts mention performances “before minors” or performances harmful “to minors.”²⁹⁰ Although the supreme court denied transfer (3-2), the opinion is difficult to reconcile with recent authority interpreting criminal statutes strictly against the State.²⁹¹ Finally, as discussed in the American Civil Liberties Union of Indiana amicus brief in support of Zitlaw’s petition, the court of appeals’s interpretation would criminalize a vast array of protected activity, including (1) “a married couple that engages in sex behind closed doors in the marital bedroom, to which children have access, although they are downstairs watching a movie,” (2) “two adults view[ing] a pornographic, but not obscene, picture in a park, where no children are actually present,” and (3) adults “sitting in a private home, after putting the children, including visiting children not related to the adults, to sleep, engaging in a discussion of the merits of American as opposed to English erotic, but not obscene, literature while reading aloud lascivious portions” of classic novels.²⁹²

In *M.S. v. State*,²⁹³ a juvenile was found delinquent for driving a vehicle that was playing a “DVD depicting nudity and sexual conduct” on a fifteen-inch screen mounted in the rearview window.²⁹⁴ Adhering to *Zitlaw*, which held “[u]nder the clear and unambiguous definition of ‘access,’ the minor need not be present,”²⁹⁵ the court affirmed the adjudication because the public street was an area in which minors had “both auditory and visual access.”²⁹⁶

288. *Id.* at 733 (Riley, J., dissenting).

289. *Id.*

290. IND. CODE § 35-49-3-3 (2006).

291. *See, e.g.,* *Brown v. State*, 868 N.E.2d 464, 470 (Ind. 2007) (concluding that identity deception requires a person to use the identifying information of an existing human being); *Smith v. State*, 867 N.E.2d 1286, 1289 (Ind. 2007) (holding a bus driver working as an independent contractor is not a “child care worker”).

292. Brief for ACLU of Indiana as Amicus Curiae Supporting Petitioner, *Zitlaw v. State*, 880 N.E.2d 724 (Ind. Ct. App. 2008), (No. 29A05-0701-CR-35, at 5-6), 2008 WL 1994264; *see also supra* notes 58-63 and accompanying text (discussing *Big Hat Books* case).

293. 889 N.E.2d 900 (Ind. Ct. App.), *trans. denied*, 898 N.E.2d 1225 (Ind. 2008).

294. *Id.* at 901.

295. *Id.* at 903.

296. *Id.*

I. Plea Agreement Views

*Owens v. State*²⁹⁷ is an unusual case in which the prosecutor included the following language regarding sentence modifications in the plea agreement:

The parties agree that this Plea Agreement will not operate as a waiver of Defendant's right to seek sentence modification within 365 days of sentencing pursuant to I.C. 35-38-1-17(a), and the Prosecuting Attorney consents and approves further filings of petitions for sentence modification thereafter under I.C. 35-38-1-17(b), provided, however, nothing in this agreement shall foreclose the State of Indiana from objecting to any modification of sentence.²⁹⁸

The court of appeals, in a split decision, concluded the "only sensible interpretation of the 'consents and approves' language is an interpretation meaning that the State waived its right to approve Owens' petition for sentence modification and has not forfeited its right to object to such a modification."²⁹⁹ Therefore, because the trial court concluded it had no discretion to rule on the motion without the State's consent, the court reversed and remanded for the trial court to exercise its discretion in ruling on the motion.³⁰⁰

*Tubbs v. State*³⁰¹ reiterates that, unless a plea agreement affords the court discretion in fixing the terms of probation, trial courts may not impose conditions that "materially add to the punitive obligation."³⁰² There, the plea agreement included the following two provisions: (1) "That the court may impose whatever sentences it deems appropriate except said sentences shall be served concurrently with each other and the executed portion, if any, shall not exceed nine years. Both sides may argue sentencing" and (2) "[t]hat, as a condition for any suspended sentence or probation, the defendant shall testify truthfully if called upon to do so."³⁰³ The defendant was sentenced to nine years at DOC followed by three years at Community Corrections.³⁰⁴ The court of appeals vacated the three-year community correction sentence because it was "an additional substantial obligation of a punitive nature not authorized by the plea agreement."³⁰⁵

Finally, Indiana Code section 35-35-1-4(b) is seldom used but is an important vehicle to relief if new facts or legal developments ("any fair and just reason") come to light after a guilty plea but before sentencing.³⁰⁶ A motion for relief

297. 886 N.E.2d 64 (Ind. Ct. App.), *trans. denied*, 898 N.E.2d 1216 (Ind. 2008).

298. *Id.* at 66.

299. *Id.* at 67.

300. *Id.* at 68.

301. 888 N.E.2d 814 (Ind. Ct. App. 2008).

302. *Id.* at 816 (quoting *Freije v. State*, 709 N.E.2d 323, 325 (Ind. 1999)).

303. *Id.* at 817.

304. *Id.* at 815.

305. *Id.* at 817.

306. IND. CODE § 35-35-1-4(b) (2008).

from a guilty plea under that statute must be in writing, include specific facts in support of the relief desired, and be verified.³⁰⁷ In *Craig v. State*,³⁰⁸ the court of appeals held the defendant should have been allowed to withdraw his guilty plea to an habitual offender enhancement entered into after a jury found him to be a serious violent felon (SVF) but before sentencing.³⁰⁹ The request in *Craig* was made shortly after the Indiana Supreme Court held in *Mills v. State*³¹⁰ that the same felony cannot be used both to establish a defendant as a SVF and as one of the predicate felonies for the habitual offender enhancement.³¹¹ Based on this favorable change in the law, the court held the defendant should have been allowed to withdraw his guilty plea.³¹²

J. Jury Instructions

Both the supreme court and court of appeals issued important decisions regarding jury instructions for a number of different situations and offenses.

In *McDowell v. State*,³¹³ the Indiana Supreme Court found the following instruction improper in a voluntary manslaughter case: “The intent to kill may be inferred from evidence that a mortal wound was inflicted upon an unarmed person with a deadly weapon in the hands of the accused.”³¹⁴ Voluntary manslaughter requires the (a) knowing or intentional (b) killing (c) of another person (d) by means of a deadly weapon.³¹⁵ The court reversed because the trial court’s instruction alleviated the State of its obligation to prove the required intent element.³¹⁶

In *Watts v. State*,³¹⁷ the supreme court made clear that a voluntary manslaughter instruction cannot be given over the defendant’s objection when there is no evidence of sudden heat.³¹⁸ Defendants may pursue an “all-or-nothing” (murder or acquittal) strategy and adding an intermediate option “deprives the defendant of the opportunity to pursue a legitimate trial strategy.”³¹⁹

In *Harris v. State*,³²⁰ the court of appeals held that trial courts must instruct juries that a specific intent to kill is required in an attempted voluntary

307. *Id.*

308. 883 N.E.2d 218 (Ind. Ct. App. 2008).

309. *Id.* at 224.

310. 868 N.E.2d 446 (Ind. 2007).

311. *Id.* at 450.

312. *Craig*, 883 N.E.2d at 222.

313. 885 N.E.2d 1260 (Ind. 2008).

314. *Id.* at 1261-62.

315. IND. CODE § 35-42-1-3(a) (2008).

316. *McDowell*, 885 N.E.2d at 1264.

317. 885 N.E.2d 1228 (Ind. 2008).

318. *Id.* at 1233.

319. *Id.*

320. 884 N.E.2d 399 (Ind. Ct. App.), *trans. denied*, 891 N.E.2d 53 (Ind. 2008).

manslaughter trial.³²¹ Although intent to kill has long been required in attempted murder cases, the Indiana Supreme Court appeared to limit the requirement of specific intent to attempted murder cases in *Richeson v. State*,³²² which held no specific intent was required in a battery case.³²³ The holding of *Harris* is a narrow one because attempted voluntary manslaughter is the same class felony as attempted murder and involves the same “intent ambiguity” as attempted murder.³²⁴

In *Surber v. State*,³²⁵ the court of appeals suggested the following jury instruction may have been inappropriate in a child molesting case: “Any sexual penetration, however slight, may be sufficient to complete the crime of child molestation.”³²⁶ The mere existence of language in an appellate opinion does not make it appropriate for a jury instruction.³²⁷ Adding language reminding the jury that “the other elements are proved” may be more appropriate in such an instruction.³²⁸ Nevertheless, the court found the instructions as a whole did not mislead the jury.³²⁹

The court of appeals confronted the propriety of jury instruction in rape cases in which the victim was under the influence of alcohol or drugs. In *Newbill v. State*,³³⁰ the court of appeals disapproved an instruction that told the jury to focus on the “victim’s perspective, not the assailant’s” in determining forceful compulsion.³³¹ The court concluded instead “the ‘perspective’ for a jury’s consideration of the evidence of forceful compulsion in a rape trial might better be described as either the ‘objective perspective of the victim’ or the ‘reasonable perspective of the victim.’”³³² In *Gale v. State*,³³³ the court reiterated that defendants in such cases must be aware of a high probability that the victim was unaware that sexual intercourse was occurring.³³⁴

K. Probation

Finally, the appellate courts issued several opinions regarding various aspects of probation, including the requisite notice, the contours of “strict compliance” probation, and restitution.

321. *Id.* at 404.

322. 704 N.E.2d 1008 (Ind. 1998).

323. *Harris*, 883 N.E.2d at 403-04.

324. *Id.*

325. 884 N.E.2d 856 (Ind. Ct. App.), *trans. denied*, 891 N.E.2d 49 (Ind. 2008).

326. *Id.* at 886-87.

327. *Id.* at 867; *accord* Schumm III, *supra* note 208, at 1010-11.

328. *Surber*, 884 N.E.2d at 867.

329. *Id.* at 868.

330. 884 N.E.2d 383 (Ind. Ct. App.), *trans. denied*, 891 N.E.2d 51 (Ind. 2008).

331. *Id.* at 393.

332. *Id.*

333. 882 N.E.2d 808 (Ind. Ct. App. 2008).

334. *Id.* at 816.

In *Hunter v. State*,³³⁵ the supreme court held that “contact” as used in standard sex offender probation conditions “lacked sufficient clarity to provide the defendant with fair notice that the conduct at issue would constitute a violation of probation.”³³⁶ There, the defendant was working inside his sister’s mobile home on several occasions when her children returned home from school. He immediately packed up his tools and left, not interacting in any way with the children. The court rejected the State’s argument that merely being in the presence of children qualified as “contact.”³³⁷

The opinion seems to suggest that trial courts could cure the vagueness problem by rewording the conditions of probation to include a broader definition similar to the one urged by the State; the defendant would then seemingly have clear notice. However, this may create the problem noted in *Piercefield v. State*,³³⁸ which held that restrictions on incidental contact are overly broad.³³⁹ *Piercefield* was remanded to revise the condition to prohibit the defendant from “being alone with or initiating contact” with children.³⁴⁰

In *Woods v. State*,³⁴¹ the trial court denied a defendant on “strict compliance” probation an opportunity to explain the violations.³⁴² The Indiana Supreme Court concluded “the very notion that violation of a probationary term will result in revocation no matter the reason is constitutionally suspect.”³⁴³ A defendant may have failed to pay probation fees because he was unable to pay or failed a drug test because of drugs prescribed by his physician. Even with “strict compliance” probation, due process requires that a defendant be given the opportunity to explain why even a “final chance” is deserving of further consideration.³⁴⁴

Both the supreme court and court of appeals reiterated some important

335. 883 N.E.2d 1161 (Ind. 2008).

336. *Id.* at 1164.

337. *Id.* Following *Hunter*, in *Richardson v. State*, 890 N.E.2d 766 (Ind. Ct. App. 2008), the court of appeals reiterated that probation conditions must provide “sufficient clarity to provide the defendant with fair notice that the conduct at issue would constitute a violation of probation.” *Id.* at 769 (quoting *Hunter*, 883 N.E.2d at 1161). Specifically, the court concluded the defendant had reported within three working days as required when he called his probation officer on a Wednesday after his release on a Friday. The court further found that he could not be found in violation for living with his parents in Kentucky when he had not been advised of any travel restrictions. *Id.* at 768-69.

338. 877 N.E.2d 1213 (Ind. Ct. App. 2007), *trans. denied*, 891 N.E.2d 34 (Ind. 2008).

339. *Id.* at 1219.

340. *Id.*

341. 892 N.E.2d 637 (Ind. 2008).

342. *Id.* at 641.

343. *Id.*

344. *Id.* Although *Woods* announces an important rule for future cases, the revocation of probation was nevertheless affirmed because the defendant made no offer of proof that would have enabled “both the trial court and the appellate court to determine the admissibility of the testimony and the prejudice which might result if the evidence is excluded.” *Id.* at 641-42 (quoting *Wiseheart v. State*, 491 N.E.2d 985, 991 (Ind. 1986)).

principles regarding restitution. In *Pearson v. State*,³⁴⁵ the Indiana Supreme Court held that when a trial court orders restitution as a condition of probation or a suspended sentence, it must inquire into the defendant's ability to pay.³⁴⁶ This is necessary to prevent indigent defendants from being incarcerated because of their inability to pay.³⁴⁷ When restitution is ordered as part of an executed sentence, however, the trial court does not need to inquire into the defendant's ability to pay.³⁴⁸ Restitution then is merely a money judgment, and a defendant cannot be imprisoned for non-payment.³⁴⁹

The probation statutes impose limitations on restitution. For crimes involving harm to property, a trial court "shall base its restitution order upon a consideration of . . . property damages of the victim incurred as a result of the crime, based on the actual cost of repair (or replacement if repair is inappropriate)."³⁵⁰ In *Rich v. State*,³⁵¹ the court of appeals reasoned in a burglary case that the "break-in damaged many things; however, a security system was not one of them."³⁵² The trial court could not order the defendant to pay for a new security system. Because the victims owned no security system, "their installation of a security system is not a 'repair' to their home, but an upgrade or improvement. Indeed, the victims' home is now protected from future, unrelated break-ins, and their home is in a better condition than before Rich's break-in."³⁵³

In *Lohmiller v. State*,³⁵⁴ the court of appeals vacated a \$25,000 restitution order payable to the county general fund against a defendant who had been employed as a county nurse before being convicted of forgery and practicing nursing without a license.³⁵⁵ Restitution awards must be based on the amount of actual loss suffered by a victim, which may only be determined by the presentation of evidence.³⁵⁶ The order was improper there because the State had not argued the county was a victim, nor had it submitted any evidence of actual damages.³⁵⁷

Finally, in *Miller v. State*,³⁵⁸ the court of appeals reiterated that trial courts may not order payment of money as a condition of probation without inquiring

345. 883 N.E.2d 770 (Ind. 2008).

346. *Id.* at 772.

347. *Id.* at 773.

348. *Id.*

349. *Id.*

350. IND. CODE § 35-50-5-3(a) (2008).

351. 890 N.E.2d 44 (Ind. Ct. App.), *trans. denied*, 898 N.E.2d 1223 (Ind. 2008).

352. *Id.* at 52.

353. *Id.*

354. 884 N.E.2d 903 (Ind. Ct. App. 2008).

355. *Id.* at 916.

356. *Id.*

357. *Id.* at 917.

358. 884 N.E.2d 922 (Ind. Ct. App.), *reh'g granted on other grounds*, 891 N.E.2d 58 (Ind. Ct. App.), *trans. denied*, 898 N.E.2d 1224 (Ind. 2008).

into the defendant's ability to pay.³⁵⁹ This is to prevent defendants from being incarcerated because of their inability to pay.³⁶⁰ Trial courts may, however, enter a money judgment against defendants without inquiring into the ability to pay.³⁶¹

359. *Id.* at 930.

360. *Id.*

361. *Id.*

2007-2008 ENVIRONMENTAL LAW SURVEY: A SYSTEM IN FLUX

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INTRODUCTION

Here, we survey the federal and state court decisions decided between October 1, 2007, and September 30, 2008, that are most likely to affect the Indiana environmental law practitioner.¹

Perhaps more than most years, this year's survey period finds the state of environmental law in significant flux. Key cases affecting the Clean Air Act (CAA),² environmental remediation, and other areas have been decided, or are pending, at the state and federal level that leave some fundamental issues unresolved and promise heated debate in the near future. As we explain in Part I, several rules promulgated under the CAA have been successfully challenged during the survey period, calling into question emission practices and regulations across the country. In addition, Part II examines key Indiana state court decisions addressing issues of first impression pertaining to the accrual of state law claims for environmental damages. Part III considers the impact of decisions that may impose new restrictions on the ability to recover costs for the remediation of environmental contamination, or to bring citizen suits, under certain federal

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1. For additional decisions that could not be addressed here but that may nonetheless be of interest, see *Citizens Against Ruining the Environment v. EPA*, 535 F.3d 670 (7th Cir. 2008) (examining the EPA rule issued under the Clean Air Act), *reh'g denied*; *Defenders of Wildlife v. Gutierrez*, 532 F.3d 913 (D.C. Cir. 2008) (examining compliance with the National Environmental Policy Act (NEPA)); *Michigan Gambling Opposition v. Kempthorne*, 525 F.3d 23 (D.C. Cir. 2008) (same), *cert. denied*, 129 S. Ct. 1002 (2009); *Duncan's Point Lot Owners Associates Inc. v. Federal Energy Regulatory Commission*, 522 F.3d 371 (D.C. Cir. 2008) (holding that the Federal Energy Regulatory Commission did not need an impact statement when determining remedial action plan for a dam operator); *American Bird Conservancy, Inc. v. FCC*, 516 F.3d 1027 (D.C. Cir. 2008) (holding that the FCC improperly denied a petition for an impact statement regarding the effect of communications towers on migratory birds); *Lemon v. Geren*, 514 F.3d 1312 (D.C. Cir. 2008) (examining compliance with NEPA); *Nuclear Information and Resource Service v. Nuclear Regulatory Commission*, 509 F.3d 562 (D.C. Cir. 2007) (considering NEPA challenge); *City of Portland v. EPA*, 507 F.3d 706 (D.C. Cir. 2007) (upholding the EPA's Safe Drinking Water Act rules regarding the parasite *Cryptosporidium*).

2. Clean Air Act, 42 U.S.C. §§ 7401-7515 (2006).

environmental laws. Finally, Part IV examines various cases that may impact the practice of environmental law in Indiana on issues of insurance, nuisance, damages, water rights, and hog farm operations.

I. CHALLENGES TO CLEAN AIR ACT RULES: A NEED TO REVISIT REGULATIONS

In many ways, CAA lawsuits held center stage during this survey period. As we discuss below, the U.S. Environmental Protection Agency (EPA) faced highly publicized—and successful—challenges to its CAA rulemaking in several areas: the regulation of hazardous air pollutants (HAPs) emissions, the regulation of interstate pollutant emissions, and the EPA's restrictions against the creation of additional state and local monitoring requirements for CAA permit holders. Thus, the EPA and many states, including Indiana, must now revisit their air quality regulations, providing stakeholders on every side another opportunity to influence how these new rules will be written.

A. *Regulatory Framework of the Clean Air Act*

The CAA requires the EPA to establish National Ambient Air Quality Standards (NAAQS) for listed pollutants found in ambient air as a result of stationary or mobile sources and that “cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare.”³ The EPA, so far, has set NAAQS for the following six pollutants, referred to as “criteria” pollutants: sulfur dioxide, particulate matter, carbon monoxide, ozone, nitrogen dioxide, and lead.⁴ The CAA also requires the EPA to divide the country into areas designated as “non attainment,” “attainment,” or “unclassifiable” for each air pollutant, indicating whether the area meets the NAAQS.⁵

Once the EPA sets the NAAQS, each state must develop and submit to the EPA for its approval a state implementation plan (SIP) that establishes how the state will meet the NAAQS for each air pollutant.⁶ Under the CAA, the SIP must contain adequate provisions that prohibit any source within the state from emitting an air pollutant that will “contribute significantly” to non attainment in, or will interfere in maintenance by, any other state's compliance with NAAQS.⁷ A state is either deemed to be in attainment with the NAAQS—meaning it meets the pollutant level set by the EPA—or in non-attainment—meaning it does not meet the NAAQS.⁸ As discussed below, different permit programs apply to

3. Clean Air Act §§ 108(a)(1)(A) & (B), 42 U.S.C. §§ 7408(a)(1)(A) & (B) (2006).

4. See National Primary and Secondary Ambient Air Quality Standards, 40 C.F.R. §§ 50.4-50.12 (2008); see also Six Common Air Pollutants, <http://www.epa.gov/air/urbanair> (last visited Aug. 16, 2009).

5. Clean Air Act §§ 107(c) & (d); 42 U.S.C. §§ 7407(c) & (d) (2006).

6. *North Carolina v. EPA*, 531 F.3d 896, 901-02 (D.C. Cir.) (citing 42 U.S.C. §§ 7407(a), 7410 (2006)), *reh'g granted in part*, 550 F.3d 1176 (D.C. Cir. 2008).

7. *Id.* at 902 (citing 42 U.S.C. § 7410(a)(2)(D)(i)(I) (2006)).

8. *Id.*

sources in areas based on whether they are in an area in attainment, or not in attainment, with the NAAQS.

Besides requiring state compliance with NAAQS and each state's respective SIP, the CAA also addresses individual air pollution sources through the regulation of specific industries. The CAA does so through New Source Performance Standards (NSPS) that require the installation of the "best available control technology" (BACT) for any new source of air pollution within the designated industry and the use of "reasonably available control technology" (RACT), after considering technological and economic feasibility, for existing major stationary sources of pollution in non-attainment areas.⁹ The NSPS provides that major stationary sources and major sources implementing major modifications¹⁰ are required to comply with standards set out in either the New Source Review (NSR) or Prevention of Significant Deterioration (PSD) permit programs.¹¹ The NSR standards apply to major sources in areas not in attainment with NAAQS; the PSD standards are applied to major sources in areas where emissions are in attainment with NAAQS.¹² The goal of the NSR program is to reduce the aggregate level of criteria pollutants in non-attainment areas by preventing new pollution sources that are not offset by the closing of, or reduction in pollution from, an existing source.¹³ The PSD program seeks to maintain attainment status for each criteria pollutant in the area thereby preventing any deterioration of air quality.¹⁴

The CAA further addresses individual air pollution sources through the regulation of releases of hazardous air pollutants (HAPs)—less widely emitted, but highly dangerous, hazardous, or toxic pollutants that are not covered by the NAAQS or SIPs.¹⁵ Section 112 of the CAA requires the EPA to regulate the emissions of HAPs based upon either the EPA or congressional determination that HAPs have the potential to cause serious health consequences.¹⁶ Over one hundred pollutants have been determined by the EPA to be HAPs. The EPA is required to list all major sources of HAPs and establish an emission standard¹⁷

9. Clean Air Act §§ 169(3), 172-73, 42 U.S.C. §§ 7479(3), 7503 (2006).

10. A "modified" source is one that has any physical change or process change that increases a criteria pollutant emission by more than a de minimis amount. Clean Air Act § 111(a), 42 U.S.C. § 7411(a)(4) (2006).

11. Clean Air Act §§ 160-69, 171-93, 42 U.S.C. §§ 7501-7515, 7470-7492 (2006).

12. *See* sources cited *supra* note 12.

13. *Id.*

14. *Id.*

15. Clean Air Act § 112, 42 U.S.C. § 7412 (2006).

16. *Id.*

17. The Clean Air Act defines "emission standard" as "a requirement established by the State or the Administrator which limits the quantity, rate, or concentration of emissions of air pollutants on a continuous basis, including any requirement relating to the operation or maintenance of a source to assure continuous emission reduction, and any design, equipment, work practice or operational standard promulgated under this chapter." Clean Air Act § 302(k), 42 U.S.C. § 7602(k) (2006).

for each HAP that requires the maximum degree of reductions in emissions, taking into consideration the cost of achieving such emission reduction, and any non-air quality health and environmental impacts and energy requirements.¹⁸ These emission controls are typically referred to as the maximum achievable control technology (MACT) standards.¹⁹ Once the EPA has listed a source of HAP under section 112, the EPA has a limited ability to remove a source unless it makes a determination that the emissions of the source are adequate to protect public health and no adverse environmental effect will result from the source emissions.²⁰

*B. Regulation of Mercury Emissions by Electric Utility
Generating Units: Starting Over*

New Jersey v. EPA,²¹ a highly visible case, involved a challenge to two rules promulgated by the EPA under the CAA provision that regulated HAPs emissions from electric utility generating units (EGUs).²² The first EPA rule at issue, known as the “Delisting Rule,” removed coal- and oil-fired EGUs from regulation under section 112 of CAA.²³ Instead of regulating the EGUs under section 112, the EPA sought to regulate these sources under section 111 of the CAA as the EPA believed it was no longer necessary and appropriate to regulate EGUs under the more stringent emission standards in section 112.²⁴ Thus, the EPA promulgated the second rule at issue, which established new performance standards for EGUs and established total mercury emission limits for states and tribal governments, and a cap-and-trade program in which new and existing EGUs could voluntarily participate.²⁵ The second rule promulgated under CAA

18. *Sierra Club v. EPA*, 551 F.3d 1019, 1027-28 (D.C. Cir. 2008) (citing 42 U.S.C. § 7412(d) (2006)).

19. Clean Air Act § 112(g)(2), 42 U.S.C. § 7412(g)(2) (2006).

20. Clean Air Act § 112(c)(9), 42 U.S.C. § 7412(c)(9) (2006).

21. 517 F.3d 574 (D.C. Cir. 2008), *cert. denied*, 129 S. Ct. 1313 (2009).

22. *Id.* at 577.

23. *Id.* (citing Revision of December 2000 Regulatory Finding (De-listing Rule), 70 Fed. Reg. 15,994 (Mar. 29, 2005) (to be codified at 40 C.F.R. pt. 63)).

24. *Id.* Section 112 requires that new sources adopt “the emission control that is achieved in practice by the best controlled similar source” with existing sources generally being required to “adopt emission controls equal to the ‘average emission limitation achieved by the best performing 12 percent of the existing sources.’” *Id.* at 578 (quoting Clean Air Act § 112(d)(3)(A), 42 U.S.C. § 7412(d)(3)(A) (2006)). In contrast, section 111 standards limit emissions by “the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated.” *Id.* at 580 n.1.

25. *Id.* at 577 (citing Clean Air Act § 111, 42 U.S.C. § 7411 (2006)). The EPA originally determined in 2000 that it was appropriate and necessary to regulate coal- and oil-fired EGUs under section 112 because EGUs were the largest domestic source of mercury and mercury emissions

section 111, was officially titled “Standards of Performance for New and Existing Stationary Sources: Electric Utility Steam Generating Units” and was generally referred to as the Clean Air Mercury Rule (CAMR).²⁶ The CAMR established: “[A] mechanism by which [mercury] emissions from new and existing [EGUs] are capped at specified, nation-wide levels. . . . [EGUs] must demonstrate compliance with the standard by holding one ‘allowance’ for each ounce of [mercury] emitted in any given year. Allowances are readily transferrable among all regulated [EGUs].”²⁷

The *New Jersey* petitioners claimed that the “Delisting Rule” violated the section 112(c)(9) requirements for delisting EGUs from regulation under section 112.²⁸ Section 112(c)(9) provides that the EPA can only delist a source if the EPA determines that emissions from no source exceed a level adequate to protect public health with an ample margin of safety and that no adverse environmental effect will be caused by the emissions from that source.²⁹ The EPA conceded that it had not in fact complied with the requirements of section 112(c)(9) in delisting mercury HAPs by EGUs.³⁰ It argued instead that compliance was not required because the CAA’s mandate to investigate whether to list EGUs should also be read to allow the EPA to subsequently determine that EGUs did not need to be listed without going through the specific delisting process outlined in section 112.³¹ Furthermore, the EPA argued that it was an inherent principle of administrative law that an agency can reverse an earlier determination or ruling whenever an agency has a principled basis for doing so, as it claimed it had there.³²

The court was not persuaded by the EPA’s arguments, and accordingly

present significant hazards to human health and to the environment. *Id.* at 579. The EPA reconsidered its regulatory approach to EGUs in 2004 and sought public comment as to whether EGU sources should stay under section 112 or be moved to section 111. *Id.* at 579-80. The EPA ultimately decided it had the authority to de-list EGUs from regulation after it made a subsequent “negative appropriate and necessary finding” under section 112, but did not go through the process of determining that no adverse environmental or health effects would result from the EGUs’ mercury emissions. *Id.* at 580 (citing Delisting Rule, 70 Fed. Reg. 15,994, 16,032 (Mar. 15, 2005) (to be codified at 40 C.F.R. pt. 63)). The EPA also stated that its initial listing was not a final agency action, and it had the ability to reverse its prior decision. *Id.* The EPA’s decision brought about the challenge in this court. *Id.* at 581.

26. Standards of Performance for New and Existing Stationary Sources: Electric Utility Steam Generating Units, 70 Fed. Reg. 28,606 (May 18, 2005) (to be codified at 40 C.F.R. pts. 60, 72, 75); see also *New Jersey*, 517 F.3d at 577.

27. 70 Fed. Reg. at 28,606.

28. *New Jersey*, 517 F.3d at 577-78, 581 (citing Clean Air Act § 112 (c)(9), 42 U.S.C. § 7412(c)(9) (2006)).

29. *Id.* at 581 (citing Clean Air Act § 112(c)(9), 42 U.S.C. 7412(c)(9) (2006)).

30. *Id.* at 582.

31. *Id.*

32. *Id.* (citing *Williams Gas Processing-Gulf Coast Co. v. FERC*, 475 F.3d 319, 326 (D.C. Cir. 2006); *Dun & Bradstreet Corp. Found. v. USPS*, 946 F.2d 189, 193 (2d Cir. 1991)).

vacated both challenged EPA rules.³³ In so ruling, the court held that the removal of a listed source was governed by section 112(c)(9).³⁴ As the EPA conceded that it had not followed the de-listing procedures in section 112(c)(9), the court looked at whether the EPA had the authority to de-list EGUs from section 112 without complying with the specific delisting requirements set forth in that section.³⁵ The court held that the EPA did not have such authority.³⁶ The statute requiring the EPA to study whether EGUs should be listed does not mention delisting.³⁷ Further, the court determined that because Congress had specifically excluded EGUs from other statutory provisions, like the exemption of EGUs from strict deadlines under section 12(c)(6) imposed on other sources, but did not do so in section 112, Congress intended that delisting could only occur if the provisions of section 112(c)(9) were followed.³⁸ Since the EPA did not follow the proper procedures to delist mercury from section 112, the EPA's decision to regulate mercury emissions from EGUs under section 111 was unlawful.³⁹ The court therefore vacated both rules and remanded them to the EPA for further reconsideration.⁴⁰

Unless the EPA is able to delist mercury emissions from EGUs under section 112(c)(9), which, as discussed above, would be quite difficult because of the specific delisting procedures in section 112 that must be followed, the EPA will have to establish maximum achievable control technology (MACT) standards.⁴¹ Congress has considered legislation that would establish a deadline for EPA action.⁴² In the meantime, applicants for permits to construct new EGUs or modify existing EGUs must seek from the EPA or the delegated state agencies, such as the Indiana Department of Environmental Management (IDEM), a case-by-case determination that the proposed units will meet MACT standards.⁴³

C. Regulating Air Emissions Across State Lines: North Carolina v. EPA

North Carolina v. EPA,⁴⁴ brought by various plaintiffs across the country against the EPA challenging the agency's promulgation of the Clean Air

33. *Id.* at 583-84.

34. *Id.* at 583.

35. *Id.* at 581 (citing *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984)).

36. *Id.* at 582.

37. *Id.*

38. *Id.*

39. *Id.* at 583.

40. *Id.* at 583-84.

41. Clean Air Act § 112(g)(2), 42 U.S.C. § 7412(g)(2) (2006).

42. *See, e.g.*, Mercury Emissions Control Act, S. 2643, 110th Cong. (2008); Mercury Emissions Reduction Act, H.R. 1087, 110th Cong. (2007).

43. Clean Air Act § 112(g)(2), 42 U.S.C. § 7412(g)(2) (2006).

44. 531 F.3d 896 (D.C. Cir.), *reh'g granted in part*, 550 F.3d 1176 (D.C. Cir. 2008).

Interstate Rule (CAIR),⁴⁵ attempted to regulate the emissions of the criteria pollutants sulfur dioxide (SO₂) and nitrogen oxides (NO_x)⁴⁶ under the CAA.⁴⁷ The purpose of CAIR was to reduce or eliminate the impact of upwind sources of pollutants that “contribute significantly” to out-of-state, downwind nonattainment of fine particulate matter (PM_{2.5}) and ozone NAAQS.⁴⁸ The EPA determined that NO_x and SO₂ were precursors to PM_{2.5} formation, and that NO_x was a precursor to ozone formation.⁴⁹ As a result, under CAIR, the EPA required states that were upwind of areas of nonattainment for PM_{2.5} and/or ozone NAAQS to implement changes to SIPs to include control measures to reduce emissions of NO_x and SO₂ if they “contribute significantly” to that state’s nonattainment.⁵⁰ CAIR allowed states to reduce SO₂ and NO_x emissions in phases and implement an interstate emission trading system for NO_x and SO₂.⁵¹

At issue in *North Carolina v. EPA* was the ability of states to comply with the NAAQS set by the EPA for PM_{2.5} and ozone.⁵² The plaintiffs challenged various aspects of CAIR. The primary plaintiff, the State of North Carolina, objected to the trading programs, the EPA’s interpretation of the “interfere with maintenance” language in 42 U.S.C. § 7410(a)(2)(D)(i)(I), the 2015 compliance date for Phase Two of CAIR, the NO_x Compliance Supplement Pool, the EPA’s interpretation of “will” in the phrase “will contribute significantly,” and PM_{2.5}’s quality threshold.⁵³ Also, electric company plaintiffs challenged the EPA’s authority “to limit the number of emission allowances in circulation, to set state SO₂ budgets as a percentage reduction in Title IV allowances, and to require exempt from Title IV acquire Title IV allowances” for the cap and trade programs.⁵⁴ Other challenges included whether the EPA had the “authority to base state NO_x budgets on the number of coal-, oil-, and gas-fired facilities a state has compared to other states in the CAIR region,”⁵⁵ as well as the start date for Phase I of the NO_x restrictions and whether certain states should have been

45. Clean Air Interstate Rule, 70 Fed. Reg. 25,162, 25,165 (May 12, 2005) (codified at scattered sections of 40 C.F.R.).

46. *North Carolina*, 531 F.3d at 901-03 (citing 42 U.S.C. §§ 7408(a)(1)(A), (B) (2006)).

47. Clean Air Act §§ 401-16, 42 U.S.C. §§ 7651-7651o (2006).

48. *North Carolina*, 531 F.3d at 903.

49. *Id.* (citing Clean Air Interstate Rule, 70 Fed. Reg. 25,162 (May 12, 2005)).

50. *Id.* at 903. States that “contribute significantly” to another state’s non-attainment for ozone were subject to ozone season limits for NO_x and those that “contribute significantly” to non-attainment for PM_{2.5} were subject to annual limits for NO_x and SO₂ under CAIR. *Id.* at 904.

51. *Id.* at 903-05. A cap-and-trade system was already in place for NO_x and SO₂. *Id.* at 902. NO_x cap and trade was put in place in 1998 under the NO_x SIP Call, and SO₂ cap and trade was part of Title IV of the Clean Air Act, which is commonly known as the Acid Rain Program. *Id.* CAIR revised the NO_x SIP Call and Acid Rain Program. *Id.* at 903.

52. *Id.* at 905.

53. *Id.*

54. *Id.*

55. *Id.*

excluded from CAIR.⁵⁶

1. *North Carolina's Challenges to CAIR.*—The court reviewed three issues raised by North Carolina: (1) the CAIR's emission trading program,⁵⁷ (2) the EPA's interpretation of the "interference with maintenance" language in 42 U.S.C. § 7410(a)(2)(D)(i)(I),⁵⁸ and (3) the 2015 compliance deadline for Phase Two of CAIR.⁵⁹ First, with regard to CAIR's emission trading program, North Carolina did not contend that emission trading was per se unlawful, but argued instead that CAIR lacked reasonable measures to verify that upwind states were properly abating their emissions as required under the CAA.⁶⁰ Under CAIR, a state received an emission cap based upon, among other things, the types of sources located in that state.⁶¹ Sources in each state were then allocated a certain emission allowance limit.⁶² Sources in one state could then sell or purchase emission credits from sources in other states, which North Carolina argued could potentially result in a state emitting more emissions than allowed under its cap.⁶³

The court agreed with North Carolina and held that the emission trading system for SO₂ and NO_x impermissibly failed to consider what an individual state's contribution of pollutants to downwind non-attainment areas would be and whether the impact of these pollutant emissions contributed significantly to the non-attainment of another state with air standards.⁶⁴ In particular, the court stated:

CAIR must do more than achieve something measurable; it must actually require elimination of emissions from sources that contribute significantly and interfere with maintenance in downwind non attainment areas. To do so, it must measure each state's "significant contribution" to downwind nonattainment even if that measurement does not directly correlate with each state's individualized air quality impact on downwind nonattainment relative to other upwind states.⁶⁵

Second, North Carolina argued that the EPA unlawfully ignored the "interfere with maintenance" language when developing the CAIR rule⁶⁶ as the EPA failed to afford protection to areas that, although currently in attainment, are

56. *Id.*

57. *Id.* at 906-09.

58. *Id.* at 909-11.

59. *Id.* at 911-12.

60. *Id.* at 907.

61. *Id.* at 904.

62. *Id.* at 907.

63. *Id.*

64. *Id.*

65. *Id.* at 908 (citing *Michigan v. EPA*, 213 F.3d 663, 679 (D.C. Cir. 2000)).

66. *Id.* at 908-09. The Clean Air Act requires the "EPA to ensure that SIPs 'contain adequate provisions'" that prohibit sources in a State from emitting air pollutants in an amount which will contribute significantly to non-attainment in "or interfere with maintenance by, any other State with respect to any [NAAQS]." *Id.* at 908 (quoting 42 U.S.C. § 7410(a)(2)(D)(i)(I) (2006)).

at risk for becoming in nonattainment due to interference from upwind sources.⁶⁷ The EPA disagreed and argued that “interfere with maintenance” was an issue only when the EPA or a state could “reasonably determine or project, based on available data, that an area in a downwind state [would] achieve attainment, but due to emissions growth or other relevant factors is likely to fall back into nonattainment.”⁶⁸

The court again agreed with North Carolina because the EPA’s interpretation essentially gave no meaning to the phrase “interfere with maintenance” as a means of separately identifying possible upwind sources that could affect downwind attainment status.⁶⁹ The EPA’s interpretation therefore violated the CAA’s plain language requiring a SIP to prevent any source “from emitting any air pollutant in amounts which will contribute significantly to nonattainment in, or interfere with maintenance by, any other state.”⁷⁰ Consequently, the court held that the EPA was required to determine what level of emissions constitutes an upwind state’s “significant contribution” to a downwind non-attainment area as well as the potential for an upwind source to interfere with the maintenance of a downwind state’s attainment status.⁷¹

Lastly, North Carolina argued that the compliance deadline set forth in CAIR for upwind sources was generally inconsistent with the compliance deadlines set forth in the NAAQS, as CAIR gave upwind sources five more years to comply with PM_{2.5} and ozone NAAQS than that required by North Carolina.⁷² The EPA tried to justify its actions by arguing that the CAA did not require the EPA to have the same CAIR compliance timeframes as those found for NAAQS.⁷³ The court disagreed and found that the EPA did not make any effort to “harmonize” the deadlines for upwind sources to eliminate their contribution with the attainment deadlines for downwind areas, forcing downwind areas to make greater reductions than required by the CAA.⁷⁴

2. *Electric Company Challenges to CAIR: Emission Allowances and Budgets.*—The electric utilities challenged CAIR’s allocation of the SO₂ and NO_x emission budgets, arguing that the EPA never explained how the budgets it set for the states related to the prohibition of significant contribution of emissions to downwind non-attainment.⁷⁵ The EPA argued that it had properly set the state SO₂ emission budget limits based on the amount of emissions that sources using “highly cost-effective” controls, and any allowances provided

67. *Id.* at 909.

68. *Id.* (citing Clean Air Interstate Rule, 70 Fed. Reg. 25,162, 25,193 n.45 (May 12, 2005) (codified in scattered sections of 40 C.F.R.)).

69. *Id.* at 909-10.

70. *Id.* (quoting 42 U.S.C. § 7410(a)(2)(D)(i)(I) (2006)).

71. *Id.* at 910-11.

72. *Id.* at 911.

73. *Id.*

74. *Id.* at 912.

75. *Id.* at 916.

under Title IV of the CAA, could eliminate.⁷⁶ The EPA also argued that it properly allocated NO_x budgets based on a “fuel factor” analysis, considering the type of fuel used for various sources within a state, such as power plants, in order to achieve what it considered a more equitable distribution of allowances to account for the variable costs of sources to comply.⁷⁷

The court disagreed with the EPA, noting the allowances set under Title IV were not designed to address the non-attainment of PM_{2.5}.⁷⁸ As such, the EPA’s failure to explain how the allowances in Title IV would achieve the goals of reducing significant contribution to downwind sources, as well as how it arrived at the reduction figures for future levels of the PM_{2.5} precursors,⁷⁹ rendered its SO₂ budget allowance arbitrary and capricious.⁸⁰ Similarly, with regard to NO_x budgets, the court found the EPA’s adjustment to the amount and type of fuel used for sources was arbitrary and capricious, as it failed to correlate with how that adjustment would reduce a state’s contribution to downwind non-attainment.⁸¹ Furthermore, the court held that the EPA’s approach of allocating allowances based on fuel type would potentially result in states subsidizing the emission controls of other states, which violates the requirement of the CAA that each state be responsible for eliminating its own significant contribution to downwind pollution.⁸²

3. *State Challenges to CAIR*.—Three states challenged their inclusion in CAIR: Texas, Florida, and Minnesota.⁸³ Texas argued that the EPA should consider the emissions from West Texas separately from the rest of the state based on the state’s size, location, and other factors.⁸⁴ The EPA disagreed, in part because of a fear of creating “in-state pollution havens.”⁸⁵ The court held that there was no duty for the EPA to divide Texas into separate areas.⁸⁶ Florida argued that the screening method used by the EPA to determine whether Florida should be included in CAIR was improper.⁸⁷ The court disagreed, finding that the EPA treated Florida like every other state and that the data supported

76. *Id.* at 916-17.

77. *Id.* at 918.

78. *Id.* at 917.

79. *Id.*

80. *Id.* at 918.

81. *Id.* at 919. The court acknowledged that the EPA’s attempt to permit more allowances in areas with coal-fired power plants was meant to help ease the economic burden of those sources to meet emission limits; however, the court held it unfairly resulted in a penalty to states with oil-burned power plants, as coal-fired EGUs could obtain additional credits if needed from the emission trading market. *Id.* at 919-20.

82. *Id.* at 921. The court also found that there was nothing in the Clean Air Act that would allow the EPA to remove Title IV emission allowances from the Title IV market. *Id.* at 922.

83. *Id.* at 905.

84. *Id.* at 923.

85. *Id.* at 924.

86. *Id.*

87. *Id.*

including Florida in CAIR for ozone and PM_{2.5}.⁸⁸ Finally, Minnesota argued that it should not have been included in CAIR, because the EPA never properly calculated its emission contribution potential because when it performed several analyses of the emissions from Minnesota, the EPA came up with a different contribution number each time and these numbers were borderline to the baseline standard the EPA had set for inclusion in CAIR.⁸⁹ The court agreed with the state, finding that the inclusion of Minnesota in CAIR was “a borderline call,” that the actual downwind contribution was still uncertain, and that the EPA needed to respond to Minnesota’s calculation concerns.⁹⁰

Although various remedies were presented to remedy CAIR’s alleged deficiencies, the court ultimately found CAIR so fundamentally flawed that the court could not choose which portions of CAIR should be saved; therefore, the entire CAIR rule had to be vacated.⁹¹ On rehearing, in an opinion outside the survey period, the court stayed its vacatur of CAIR until the EPA promulgated a revised rule consistent with the court’s prior ruling, but noted that such a stay was not indefinite.⁹² Nonetheless, the EPA must re-analyze the emission cap, reconsider which states should be included in CAIR, determine what the compliance date will be, and re-write the cap and trade program, which essentially requires a complete overhaul of the rule as originally written.⁹³

D. Challenges to State Authority to Supplement Title V Permit Requirements

The EPA faced yet another challenge to its rulemaking authority in *Sierra Club v. EPA*,⁹⁴ which involved a challenge to an EPA rule that prevented state and local authorities from adding additional monitoring requirements to air permits issued under Title V of the CAA.⁹⁵ Title V of the CAA established a national permit regime for issuing permits to stationary sources of air pollution that included emission limits and monitoring requirements, and gave the EPA the authority to identify the minimum elements of the permit program, to establish compliance procedures, and to object to permits it deems not to comply with the CAA.⁹⁶ The EPA can delegate responsibility of issuing the Title V permits to the state and local authorities.⁹⁷ At issue in *Sierra Club* was whether the monitoring

88. *Id.* at 925-26.

89. *Id.* at 926-27.

90. *Id.* at 928.

91. *Id.* at 929.

92. *North Carolina v. EPA*, 550 F.3d 1176, 1177-78 (D.C. Cir. 2008).

93. *North Carolina*, 531 F.3d at 929-30.

94. 536 F.3d 673 (D.C. Cir. 2008).

95. *Id.* at 674.

96. *Id.* (citing 42 U.S.C. § 7661 (2006)).

97. *Id.* A first notice for a CAIR replacement rule was published in the Indiana Register in October 2008. Development of New Rules Concerning Nitrogen Oxide and Sulfur Dioxide Emissions from Fossil Fuel-Fired Power Plants, Ind. Legis. Servs. Agency Doc. 08-817 (proposed Oct. 22, 2008), available at <http://www.in.gov/legislative/iac/20081022-IR-326080817FNA>.

requirements in Title V permits were sufficient to assure compliance with permit terms and conditions required by the CAA, and whether it was the EPA or the permitting authority's (i.e. the state's) responsibility to make sure the monitoring requirements were in fact sufficient to assure compliance.⁹⁸

In 1990, the EPA set forth the rules establishing the minimum requirements for administering the Title V program,⁹⁹ which required that a Title V permit identify "[a]ll monitoring . . . required under applicable monitoring and testing requirements," but if an applicable requirement did not contain periodic testing, then the Title V permit must include "periodic monitoring sufficient to yield reliable data from the relevant time period that are representative of the source's compliance with the permit."¹⁰⁰ The rule also provided that all permits contain monitoring requirements sufficient to assure compliance with the terms and conditions of the Title V permit to address concerns that periodic emissions monitoring would not be sufficient to ensure compliance with permit requirements.¹⁰¹ In its 2006 rule, the EPA determined that only it could set monitoring requirements and that state and local authorities did not have the power to insert a monitoring requirement into a source's Title V permit.¹⁰²

In evaluating the EPA's rule, the court looked at the EPA's historical treatment of this issue, which showed that the EPA had at one time allowed state and local permitting authorities to supplement periodic monitoring requirements to assure compliance.¹⁰³ In determining that the EPA's 2006 rule violated the CAA, the court examined the language of the EPA rule and found that the EPA's monitoring requirement was insufficient "to assure compliance" with emission limits and needed to be supplemented with a more rigorous standard.¹⁰⁴ The court also noted that the EPA could have fixed the inadequate monitoring in one of two ways: (1) through a rulemaking process before any permits were issued under Title V, which it did not do; or (2) by "[authorizing] permitting authorities to supplement inadequate monitoring requirements on a case-by-case basis."¹⁰⁵ Yet, because the EPA had previously chosen to allow permitting authorities to supplement monitoring requirements before the promulgation of the challenged 2006 rule, instead of implementing its own rules to fix the inadequate monitoring, if state and local authorities did not continue to supplement monitoring requirements there would be permits that did not fully comply with Title V.¹⁰⁶ The court held this violated the CAA requirement that each permit issued under Title V have adequate monitoring requirements to assure

xml.html (last visited Aug. 1, 2009).

98. *Sierra Club*, 536 F.3d at 675 (citing 42 U.S.C. § 7661c(c) (2006)).

99. *See* Clean Air Act § 504, 42 U.S.C. § 7661a(b) (2006).

100. *Sierra Club*, 536 F.3d at 675 (citing 40 C.F.R. §§ 70.6(a)(3)(i)(A) & (B) (2008)).

101. *Id.* (citing 40 C.F.R. § 70.6(c)(1)).

102. *Id.* at 676.

103. *Id.*

104. *Id.* at 677 (citing 40 C.F.R. § 70.6(c)(1)).

105. *Id.*

106. *Id.*

compliance.¹⁰⁷ The court acknowledged that the EPA could have solved the problem by fixing the inadequate monitoring requirements prior to the issuance of any Title V permit, but failed to do so, and therefore the state and local authorities must be allowed to fix the monitoring inadequacies before the permits could be issued.¹⁰⁸ Therefore, *Sierra Club* allows a permitting authority to supplement an inadequate monitoring requirement and therefore comply with the CAA.¹⁰⁹

E. In the Wings: Decisions to Examine Going Forward

As a preview for next year's survey article, we note that the court in *United States v. Cinergy Corp.*,¹¹⁰ issued an opinion outside the survey period that significantly expanded the scope, and type, of relief available to the government for permit requirements violations under the New Source Review program.¹¹¹ Similarly, *Sierra Club v. EPA (Sierra II)*,¹¹² pending before the District of Columbia Circuit Court of Appeals during the survey period, addressed a challenge to an EPA rule exempting major sources of HAPs from normal emission standards during periods of startups, shutdowns, and malfunctions (SSM), and instead imposed less burdensome alternative requirements in the place of the normal emission standards.¹¹³ Finally, standing and permit violations under the PSD program were addressed in *Sierra Club v. Franklin County Power of Illinois, LLC*.¹¹⁴

II. CHANGING RULES FOR OBTAINING COSTS FOR ENVIRONMENTAL CONTAMINATION: INDIANA COURTS ADDRESS KEY STATUTE OF LIMITATIONS ISSUES FOR STATE LAW ACTIONS

The Indiana Supreme Court recently clarified Indiana law with regard to the accrual of two key types of claims for environmental damages:¹¹⁵ (1) claims

107. *Id.*

108. *Id.* at 678-79.

109. *Id.* at 680.

110. 582 F. Supp. 2d. 1055 (S.D. Ind. 2008).

111. *Id.* at 1066.

112. 551 F.3d 1019 (D.C. Cir. 2008).

113. *Id.* at 1028. In an opinion issued after the survey period, the D.C. Circuit Court vacated the EPA's rule, holding that SSM exemption violated the Clean Air Act § 112 requirement that certain emission standards apply continuously. *Id.* at 1027-28.

114. 546 F.3d 918, 922 (7th Cir. 2008), *cert. denied*, 129 S. Ct. 2866 (2009).

115. Under Indiana's discovery rule, a cause of action accrues, and the statute of limitation begins to run, when a claimant knows, or in exercise of ordinary diligence should have known, of the injury. *Wehling v. Citizens Nat'l Bank*, 586 N.E.2d 840, 842-43 (Ind. 1992). The discovery rule is based on the reasoning that it is inconsistent with our system of jurisprudence to require a claimant to bring her cause of action during a limited period in which, even with due diligence, she could not be aware that a cause of action exists. *New Welton Homes v. Eckmant*, 830 N.E.2d 32, 37 (Ind. 2005) (Rucker, J., dissenting) (citing *Baines v. A.H. Robins Co.*, 476 N.E.2d 84, 86 (Ind.

brought pursuant to the Indiana Underground Storage Tank Act (USTA);¹¹⁶ and (2) claims for “stigma damages”—damages resulting from the stigma of environmental contamination.¹¹⁷ Furthermore, the court is set to address statute of limitations issues associated with the Environmental Legal Action statute (ELA), as well as common law tort claims for environmental costs.

A. *Pflanz v. Foster: Underground Storage Tank Act and Stigma Damages*

On June 19, 2008, the Indiana Supreme Court ruled in *Pflanz v. Foster*¹¹⁸ that the statute of limitations for a cost recovery action under the USTA is ten years,¹¹⁹ which did not begin to run until after a party was ordered to clean up the property “regardless of whether an owner earlier knew or should have known about the need for cleanup.”¹²⁰ The court also ruled that a claim for environmental stigma damages was subject to a six-year statute of limitations that only accrued after remediation had been substantially completed.¹²¹ As such, *Pflanz* arguably gave a significant victory to entities seeking to recover clean-up costs.

Under the USTA, an owner or operator of an underground storage tank (UST) is generally liable to the State of Indiana “for the actual costs of any corrective action taken . . . involving [a UST].”¹²² Such owners and operators are also “responsible for undertaking any corrective action, including undertaking an exposure assessment, ordered . . . or required” by the State.¹²³ In addition, any person who pays the State of Indiana to take corrective action regarding a UST, or who undertakes such corrective action on his own, is entitled to contribution from the person who owned or operated the tank when the release occurred.¹²⁴ The USTA applies to contamination that occurred prior to the enactment of the statute, as well as releases occurring after the statute’s enactment.¹²⁵

1985)).

116. IND. CODE § 13-23-13-8 (2004).

117. *Terra-Products, Inc. v. Kraft Gen. Foods, Inc.*, 653 N.E.2d 89, 95 (Ind. Ct. App. 1995).

118. 888 N.E.2d 756 (Ind. 2008).

119. *Id.* at 758. Contributions claims under the USTA had been previously recognized as having a ten-year statute of limitations. *Comm’r, Ind. Dep’t of Env’tl. Mgmt. v. Bourbon Mini-Mart, Inc.*, 741 N.E.2d 361, 371-72 (Ind. Ct. App. 2000), *aff’d in relevant part* by 783 N.E.2d 253, 257 (Ind. 2003).

120. *Pflanz*, 888 N.E.2d at 757.

121. *Id.* at 758-60.

122. IND. CODE § 13-23-13-8(a) (2004). Indiana’s USTA statute exempts owners and operators that “can prove that a release from an underground storage tank was caused solely by: (1) an act of God; (2) an act of war; (3) negligence on the part of the state or the United States government; or (4) any combination of the causes set forth in subdivisions (1) through (3),” from liability. *Id.*

123. *Id.*

124. *Id.* § 13-23-13-8(b).

125. *Bourbon Mini-Mart, Inc. v. Gast Fuel & Servs., Inc.*, 783 N.E.2d 253, 261 (Ind. 2003).

Indiana law permits recovery of stigma damages for losses in the fair market value of property after remediation of environmental contamination.¹²⁶ Stigma damages are warranted where the claimant can demonstrate that an imperfect market rendered her property less valuable despite complete restoration.¹²⁷

In *Pflanz*, the plaintiffs purchased a former gas station from the defendant Foster in 1984.¹²⁸ The Pflanzes alleged that before the sale, Foster informed them that there were underground storage tanks on the property but the tanks were not in use and had been properly emptied and sealed.¹²⁹ In 2001, the Pflanzes learned that the tanks were leaking fuel, and were ordered by IDEM to clean up the property.¹³⁰ Three years later, and twenty years after purchasing the property, the Pflanzes filed suit against Foster seeking the costs of the clean-up for the leaking tanks under the USTA and property damage for the stigma of environmental contamination.¹³¹ The parties agreed that the general ten-year statute of limitations applied to the Pflanzes' USTA contribution claim; however, they disagreed on when the statute of limitations began to run.¹³²

Foster moved to dismiss the Pflanzes' claims on statute of limitations grounds, arguing that the Pflanzes' claims began to run when the USTA was first enacted.¹³³ After the trial court dismissed the Pflanzes' claims, the Indiana Court of Appeals affirmed the dismissal.¹³⁴ The Indiana Court of Appeals concluded that "the Pflanzes, in the exercise of reasonable diligence, should have tested the property for contamination" when Indiana enacted and amended the USTA's contribution statute in 1987 and 1991.¹³⁵ Furthermore, the court found that the Pflanzes' claims had to be filed no later than 1997, which was six years after the enactment of certain amendments to the USTA.¹³⁶

The Indiana Supreme Court reversed, holding that the ten year statute of limitations for a cost recovery action under the USTA did not begin to run "until

126. *Terra-Products, Inc. v. Kraft Gen. Foods, Inc.*, 653 N.E.2d 89, 95 (Ind. Ct. App. 1995).

127. *Id.* at 93. *Terra-Products, Inc.*, was a PCB contamination case in which the Indiana Court of Appeals recognized the right to recover damages for a loss in the fair market value of property due to stigma if the party could demonstrate that an imperfect market rendered its property less valuable despite complete restoration. *Id.* (citing *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 797 (3d Cir. 1994)). The court applied a three-element test for a stigma damages claims: "(1) defendants have caused some (temporary) physical damage to plaintiffs' property; (2) plaintiffs demonstrate that repair of this damage will not restore the value of the property to its prior level; and (3) plaintiffs show that there is some ongoing risk to their land." *Id.* (citing *In re Paoli*, 35 F.3d at 797-98).

128. *Pflanz v. Foster*, 888 N.E.2d 756, 758 (Ind. 2008).

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

after the Pflanzes were ordered to clean up the property.”¹³⁷ In this regard, the court noted that

in contribution or indemnification cases, the damage that occurs is the incurrence of a monetary obligation that is attributable to the actions of another party. That is why, generally, parties bringing contribution and indemnification claims must wait until after the obligation to pay is incurred, for otherwise the claim would lack the essential damage element.¹³⁸

Therefore, the court held that because IDEM’s order regarding the Pflanz property was issued in 2001, the Pflanzes’ lawsuit was well within the ten-year statute of limitation, and that passage of the USTA did not, as a matter of law, automatically put landowners on notice that they should inspect and monitor their property for underground storage tanks.¹³⁹ In addition, the court officially recognized claims for stigma damages and noted that they were subject to a six-year statute of limitations that could not “ripen until remediation has been substantially completed because only then can the impact of the former environmental contamination on property value be determined.”¹⁴⁰

B. Indiana Supreme Court to Review Statute of Limitations for Environmental Legal Action and State Tort Claims

On November 20, 2007, the Indiana Supreme Court granted transfer in *Cooper Industries, LLC v. City of South Bend*,¹⁴¹ to address the applicable statute of limitation for environmental contamination claims alleging common law trespass and nuisance as well as claims brought under the Environmental Legal Action statute (ELA).¹⁴² The Indiana Supreme Court issued its opinion in *Cooper*, outside the survey period, but before the publication of this Article. A full analysis of the court’s opinion will be provided in the next survey article. In short, the court reversed the decision of the Indiana Court of Appeals, in part, holding that the City of South Bend’s claims for property damage claims brought under the ELA were timely as South Bend did not have a complete cause of action until the ELA became effective and that the statute of limitations did not begin to accrue until that date.¹⁴³

137. *Id.* at 759.

138. *Id.* (citing Comm’r, Ind. Dep’t of Env’tl. Mgmt. v. Bourbon Mini-Mart, Inc., 741 N.E.2d 361, 372 n.9 (Ind. Ct. App. 2000), *aff’d in relevant part* by 783 N.E.2d 253, 257 (Ind. 2003)).

139. *Id.* at 759-60.

140. *Id.* at 760 (citing Allgood v. Gen. Motors Corp., No. 102-CV-1077-DFH-TAB, 2006 WL 2669337, at *36 (S.D. Ind. Sept. 18, 2006)); *see also* IND. CODE § 34-11-2-7 (2008).

141. 863 N.E.2d 1253 (Ind. Ct. App.), *trans. granted*, 878 N.E.2d 219 (Ind. 2007), *vacated*, 899 N.E.2d 1274 (Ind. 2009).

142. *Id.*; *see also* IND. CODE § 13-30-9-2 (2008).

143. *Cooper Indus. v. City of S. Bend*, 899 N.E.2d 1274, 1279, 1285-86 (Ind. 2009).

III. DEVELOPMENTS IN FEDERAL REGULATION OF RCRA AND CERCLA

In 1976, the Resource Conservation and Recovery Act (RCRA)¹⁴⁴ was enacted to regulate ongoing hazardous waste disposal and handling.¹⁴⁵ Four years later Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)¹⁴⁶ to shore up a perceived gap in the protection provided under RCRA for inactive, abandoned hazardous waste sites¹⁴⁷ and to “provide for liability, compensation, cleanup, and emergency response for hazardous substances released into the environment and the cleanup of inactive hazardous waste disposal sites.”¹⁴⁸ The CERCLA regulates enumerated “hazardous wastes,” but specifically excludes petroleum wastes from its ambit.¹⁴⁹

Under CERCLA, the Federal Government may clean up a contaminated area itself or may compel responsible parties to perform the cleanup.¹⁵⁰ In either case, the Government may recover its response costs under CERCLA section 107, 42 U.S.C. § 9607, the “cost recovery” section of CERCLA.¹⁵¹ Section 107(a) lists four classes of potentially responsible persons (PRPs)¹⁵² and provides that they

144. 42 U.S.C. § 6972 (2006).

145. *Id.*

146. 42 U.S.C. §§ 9601-9675 (2006).

147. *See generally* Metro. Water Reclamation Dist. v. N. Am. Galvanizing & Coatings, Inc., 473 F.3d 824, 826-27 (7th Cir. 2007), *reh’g denied*; Wilshire Westwood Assoc. v. Atl. Richfield, 881 F.2d 801, 805-08 (9th Cir. 1989); Commercial Logistics Corp. v. ACF Indus., Inc., 2006 U.S. Dist. LEXIS 84338, at *10-11 (S.D. Ind. July 18, 2006), *vacated on other grounds*, 316 F. App’x 499 (7th Cir. 2009).

148. H.R.7020, 96th Cong., 2d Sess. (1980). The Seventh Circuit has explained that CERCLA was enacted for two reasons: (1) to “establish a comprehensive response and financing mechanism to abate and control the vast problems associated with abandoned and inactive hazardous waste disposal sites”; and (2) “to shift the costs of cleanup to the parties responsible for the contamination.” *Metro. Water Reclamation Dist.*, 473 F.3d at 827 (quoting H.R. REP. 96-1016, at 1 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6119, 6125).

149. 42 U.S.C. § 9601(14) (2006); *see generally* Pantry, Inc. v. Stop-N-Go Foods, Inc., 777 F. Supp. 713, 720 (S.D. Ind. 1991), *modified*, 796 F. Supp. 1164 (S.D. Ind. 1992).

150. *See* 42 U.S.C. §§ 9604, 9606(a) (2006); *see also* Key Tronic Corp. v. United States, 511 U.S. 809, 814 (1994). CERCLA allows the EPA the option to commence cleanup of a particular property or site on its own using monies from the Hazardous Substances Superfund. 42 U.S.C. § 9604(c)(1) (2006). The Hazardous Substances Superfund is a fund established by CERCLA and financed through a combination of appropriations, EPA fees, and industry taxes. 26 U.S.C. § 9507(b) (2006); *United States v. Hercules, Inc.*, 247 F.3d 706, 715 (8th Cir. 2001).

151. Comprehensive Environmental Response, Compensation, and Liability Act § 107, 42 U.S.C. § 9607 (2006).

152. Comprehensive Environmental Response, Compensation, and Liability Act § 107(a), 42 U.S.C. § 9607(a) (2006) divides potentially responsible parties into the following four categories:

(1) the owner and operator of a vessel or a facility,

(2) any person who at the time of disposal of any hazardous substance owned or

“shall be liable” for, among other things, “all costs of removal or remedial action incurred by the United States Government . . . not inconsistent with the national contingency plan.”¹⁵³

Section 107(a) further provides that PRPs shall be liable for “any other necessary costs of response incurred by any other person consistent with the national contingency plan.”¹⁵⁴ For PRPs, liability under section 107(a) has generally be held to be strict, joint, and several.¹⁵⁵ In 1986, Congress amended CERCLA to include the Superfund Amendments and Reauthorization Act (SARA),¹⁵⁶ which added an express right of contribution to CERCLA that provides, “[a]ny person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action under section 9606 of this title or under section 9607(a) of this title.”¹⁵⁷ In addition, SARA at section 113(f)(3)(B) provides,

[a] person who has resolved its liability to the United States or a State for some or all of a response action or for some or all of the costs of such action in an administrative or judicially approved settlement may seek contribution from any person who is not party to a settlement.¹⁵⁸

operated any facility at which such hazardous substances were disposed of,

(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and

(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance.

153. 42 U.S.C. § 9607(a)(4)(A) (2006). The national contingency plan specifies procedures for preparing and responding to contaminations and was promulgated by the EPA pursuant to CERCLA § 105 or 42 U.S.C. § 9605 (2006). The plan is codified at 40 C.F.R. §§ 300.1 to .1105 (2008).

154. 42 U.S.C. § 9607(a)(4)(B) (2006).

155. *Metro. Water Reclamation Dist. v. N. Am. Galvanizing & Coatings*, 473 F.3d 824, 827 (7th Cir. 2007), *reh'g denied*.

156. *See* Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (1986).

157. 42 U.S.C. § 9613(f)(1) (2006).

158. *Id.* § 9613(f)(3)(B). Before the enactment of SARA, courts had held that section 107(a)(4)(B) allowed certain PRPs that voluntarily incurred response costs and were not subject to suit to recover costs from other PRPs. *See, e.g., Wickland Oil Terminals v. Asarco, Inc.*, 792 F.2d 887, 890-92 (9th Cir. 1986); *Walls v. Waste Res. Corp.*, 761 F.2d 311, 317-18 (6th Cir. 1985). Courts also held that even though CERCLA did not provide expressly for a right of contribution, a PRP who was to commence cleanup or repay response costs under section 107(a) had an implied right to obtain contribution from other responsible parties. *See, e.g., United States v. New Castle*

In *Cooper Industries v. Aviall Services, Inc.*,¹⁵⁹ the U.S. Supreme Court held that a private party could seek contribution under section 113(f)(1) only after being sued under section 106 or section 107(a).¹⁶⁰ However, the Court later held in *United States v. Atlantic Research Corp.*¹⁶¹ that PRPs could pursue a cause of action to recover costs from other PRPs under section 107(a).¹⁶²

The Supreme Court's opinion in *Atlantic Research* clarified that there are two distinct causes of action under CERCLA. The first is a cause of action for cost recovery, which may be brought under CERCLA section 107 by a party that has incurred costs in cleaning up a contaminated site. The second is a cause of action for contribution, which may be pursued under CERCLA section 113 by a defendant in a CERCLA lawsuit or by a person at least partially responsible for contaminating the site.¹⁶³ These actions are brought pursuant to CERCLA sections 107(a), 113(f)(1), or 113(f)(3).¹⁶⁴

A. Possible New Restrictions on Rights to Contribution Under CERCLA Section 113

The decision of the United States District Court for the Northern District of Indiana in *City of Gary v. Shafer*¹⁶⁵ has added heightened scrutiny to whether PRPs can obtain costs under CERCLA section 113(f)(3) following entry into a remediation agreement with the State of Indiana. In *Shafer*, the City of Gary obtained contaminated property as part of a settlement with a company for delinquent taxes, and filed suit against former owners of the property to recover

County, 642 F. Supp. 1258, 1263-69 (D. Del. 1986) (contribution right arises under federal common law); *Wehner v. Syntex Agribusiness, Inc.*, 616 F. Supp. 27, 31 (E.D. Mo. 1985) (finding that contribution right is implied from section 107(e)(2)).

159. 543 U.S. 157 (2004).

160. *Id.* at 161.

161. 551 U.S. 128 (2007).

162. *Id.* at 141.

163. *Id.* at 138-39; *Appleton Papers Inc. v. George A. Whiting Paper Co.*, 572 F. Supp. 2d 1034, 1041 (E.D. Wis. 2008). It should be noted that CERCLA provides either a three- or a six-year statute of limitation, depending on the type of action and the nature of the cleanup activities performed at the site. See *Northstar Partners v. S&S Consultants, Inc.*, 2004 U.S. Dist. LEXIS 7799, at *8-9 (S.D. Ind. Mar. 31, 2004) (interpreting 42 U.S.C. §§ 9607(a), 9613(f)(1) (2006)).

164. *Atl. Research Corp.*, 551 U.S. at 138-39. *Atlantic Research* further held that when a PRP pays a judgment or discharges its obligation under a settlement agreement, recovery of those costs must be pursued under section 113(f), rather than section 107. *Id.* CERCLA section 113(f)(3)(B) permits a PRP to seek contribution after it "has resolved its liability to the United States or a State in an administrative or judicially approved settlement." *Id.* at 139 n.5 (citing 42 U.S.C. § 9613(f)(3)(B) (2006)). Moreover, a PRP's right to contribution under section 113(f)(1) is contingent upon an inequitable distribution of common liability among liable parties. *Id.* at 139; see also *Appleton Papers Inc.*, 572 F. Supp. 2d at 1041 (holding contribution claim was appropriate to recover excess payments made by the two PRPs from other PRPs).

165. No. 2:07-CV-56-PRC, 2007 U.S. Dist. LEXIS 75503 (N.D. Ind. Oct. 4, 2007).

remediation costs pursuant to CERCLA sections 107 and 113.¹⁶⁶ The defendants moved to dismiss Gary's claims under section 113(f) on the ground that Gary could not maintain a section 113 claim.¹⁶⁷ Gary argued that it could bring a contribution claim against the defendants pursuant to section 113(f)(3)(B) because it had "resolved any potential liability to the state and federal government with regard to the Property through a Voluntary Remediation Agreement [(VRA)]" reached with the State of Indiana via IDEM.¹⁶⁸

The *Shafer* court disagreed and dismissed the City's CERCLA section 113 claim, because the VRA did not resolve all of Gary's CERCLA liability.¹⁶⁹ In reaching this conclusion, the court noted that Section 113(f)(3)(B) is concerned with potential CERCLA liability resolution with the state and federal government.¹⁷⁰ Consequently, because "section 113(f)(3)(B) [creates] a contribution right only when liability for CERCLA claims, rather than some broader category of legal claims is resolved," an agreement with a State that leaves open any possibility of CERCLA liability prohibits a party from obtaining contribution under section 113(f)(3)(B).¹⁷¹ The court went on to note that Gary's settlement agreement with the State of Indiana contained two provisions that left Gary's CERCLA liability unresolved:

First, the Compliance with Applicable Laws section of the VRA, paragraph 28 provides:

Nothing in this Agreement, the Certificate of Completion, or the Covenant Not to Sue shall be construed to relieve the [City of Gary] of any natural resource damage liability arising from contaminants, even if addressed by the Remediation Work Plan, including under the following authorities: 42 U.S.C. § 9601 . . . (CERCLA).

Second, the Reservation of Rights section of the VRA, paragraph fifty-nine provides:

IDEM reserves the right to bring an action, including an administrative action, against [the City of Gary] for any violations of statutes or regulations except for the specific violations or releases that are being remediated in the Remediation Work Plan.¹⁷²

166. *Id.* at *4-7.

167. *Id.* at *18.

168. *Id.* at *18-19.

169. *Id.* at *24-25.

170. *Id.* at *19-20 (quoting *City of Waukesha v. Viacom Int'l Inc.*, 404 F. Supp. 2d 1112, 1115 (E.D. Wis. 2005)).

171. *Id.* (quoting *City of Waukesha.*, 404 F. Supp. 2d at 1115)).

172. *Id.* at *21.

The court found that these paragraphs failed to relieve Gary of all CERCLA liability for environmental damage for the properties at issue.¹⁷³ Furthermore, the court stated that Indiana's Memorandum of Agreement with the EPA did not help, because Gary did not have a Certificate of Completion showing remediation was complete and the Memorandum of Agreement allowed the EPA to bring an action under CERCLA if the "site poses an imminent and substantial threat to human health or the environment."¹⁷⁴ Whether the property was an exceptional circumstance that would warrant CERCLA prosecution by the EPA was a question not before the court.¹⁷⁵

As such, under *Shafer*, settlement with the State of Indiana will no longer automatically be sufficient to show that CERCLA liability for natural resource or other damages has been resolved allowing a party to obtain contribution costs under CERCLA section 113 (f)(3)(B). As it is common for remediation agreements with the State of Indiana and federal entities not to resolve liability for natural resource damages under CERCLA, *Shafer* presents a potential obstacle for PRPs in Indiana. Nonetheless, *Shafer* leaves open the possibility that the receipt of a Certificate of Completion for a property, as well as a factual showing that no imminent or substantial threat to human health exists, when presented along with an agreement with the State of Indiana pertaining to liability may be sufficient to allow the recovery of costs under section 113(f)(3)(B).

B. Other Developments in CERCLA and RCRA

The Seventh Circuit recently held that courts do not have jurisdiction under CERCLA to address citizen suit challenges to cleanup efforts while cleanup efforts are underway. In *Pollack v. United States Department of Defense*,¹⁷⁶ a citizen plaintiff filed suit against defendants under CERCLA contending that the military had "improperly transferred ownership" of a contaminated property in violation of CERCLA.¹⁷⁷ After the Army closed its operations on the property, it transferred control of part of the property, but retained "responsibility and liability for environmental restoration of the property."¹⁷⁸ After the EPA discovered waste from the property spilling out into the air and water, the Army,

173. *Id.* at *21-22.

174. *Id.* at *23-24.

175. *Id.* The Eastern District of Missouri reached a conclusion similar to the *Shafer* court, holding that a PRP could not pursue a contribution claim under CERCLA section 113(f) following an entry into an agreement with the State of Missouri because Missouri had "no CERCLA authority absent specific agreement with the federal Environmental Protection Agency" and the agreement that was entered into could be terminated at any time. *Westinghouse Elec. Co. v. United States*, No. 4:03-CV-861-SNL, 2008 U.S. Dist. LEXIS 57232, at *10-15 (E.D. Mo. July 29, 2008) (quoting *Niagra Mohawk Power Corp. v. Consol. Rail Corp.*, 436 F. Supp. 2d 398, 402 (N.D.N.Y. 2006)).

176. 507 F.3d 522 (7th Cir. 2007).

177. *Id.* at 523.

178. *Id.* at 524.

along with the U.S. and Illinois EPAs developed and implemented an interim plan to address the contamination.¹⁷⁹ After the transfers, plaintiff sued alleging a violation of CERCLA as the EPA had “not [signed] off on the Army’s cleanup plan before the property changed hands.”¹⁸⁰ In dismissing the plaintiff’s suit, the court held that CERCLA section 113(h) deprived the court of jurisdiction to address citizen suit challenges to ongoing cleanup efforts and that jurisdiction over such citizen suits are limited to those brought after the challenged cleanup is completed.¹⁸¹

Similarly, in a case of first impression, a district court dismissed a citizen’s suit brought under the Resource Conservation and Recovery Act (RCRA) after the defendant entered into an Administrative Order on Consent (AOC) with the EPA to clean up the site under CERCLA.¹⁸² Citing CERCLA’s pre-enforcement bar, the District Court of the Northern District of Illinois held, in *River Village West LLC v. Peoples Gas Light & Coke Co.*,¹⁸³ that the AOC served to bar the citizen’s suit as a challenge to a remedial or removal action being supervised by the EPA, despite the fact that the AOC was negotiated and signed years after the RCRA case was originally filed.¹⁸⁴

In the last year, the Northern District of Illinois also interpreted the meaning of “disposal” and “solid waste” under CERCLA and RCRA in its *Sycamore Industrial Park Associates v. Ericsson, Inc.*¹⁸⁵ decision. In *Sycamore Industries*, the plaintiff sought to compel the defendant, Ericsson, Inc., to remove asbestos insulation located in an old unused boiler system at a site purchased by the plaintiffs and to pay costs incurred by the plaintiff in removing the asbestos.¹⁸⁶ In particular, the plaintiff claimed that by discontinuing use of the boiler-based heating system containing asbestos insulation but not removing it from the property, Ericsson abandoned it, thereby disposing of hazardous waste under the terms of CERCLA and RCRA.¹⁸⁷ In granting summary judgment, the trial court stated that although Ericsson had abandoned the asbestos boiler system on the property, the boiler system was not a “solid waste” and had not been “disposed” of by Ericsson under CERCLA through the property sale because “the sale of a

179. *Id.* Later, the Army submitted a proposed final remedial plan to the Illinois EPA for review and comment. *Id.*

180. *Id.* (citing 42 U.S.C. § 9620(h) (2006)).

181. *Id.* at 523, 525.

182. *River Vill. W. LLC v. Peoples Gas Light & Coke Co.*, 618 F. Supp. 2d 847, 855 (N.D. Ill. 2008).

183. *Id.* at 852-54 (“Plaintiffs provide no support, nor does it seem that any exists, for their contention that RCRA bars only those actions filed *after* an AOC has been entered with the EPA A plain language reading of § 113(h) demonstrates that the provision makes no reference to the timing issues presented by Plaintiffs and speaks in general terms of the inability of federal courts to hear challenges to removal or remedial actions.”).

184. *Id.* at 854-55.

185. 2008 U.S. Dist. LEXIS 1533 (N.D. Ill. Jan. 9, 2008), *aff’d*, 546 F.3d 847 (7th Cir. 2008).

186. *Id.* at *1-4.

187. *Id.* at *5.

product which contains a hazardous substance cannot be equated to the disposal of the substance itself or even the making of arrangements for its subsequent disposal.”¹⁸⁸ Similarly, the court stated that no liability existed under RCRA because the boiler system was not “discarded material” or solid waste as it was instead materials fixed to a building itself.¹⁸⁹ Furthermore, the court noted that the sales contract for the property did not require Ericsson to remove the boiler system.¹⁹⁰ During the survey period this case was pending review before the Seventh Circuit.¹⁹¹

C. Significant Changes Possible in the Next Year

In its next term, the U.S. Supreme Court will decide a liability question previously believed to have been known—when liability under CERCLA is “joint and several” and when it can be “reasonably apportioned.”¹⁹² The position of the EPA, the U.S. Department of Justice, and the Seventh Circuit has long been that liability under CERCLA is joint and several, except where a party can provide that the harm is divisible.¹⁹³ Most liable parties, and their lawyers, have come to accept this liability scheme as unchangeable. But an oil company and two railroads, on the hook for a multi-million dollar cleanup, have urged the U.S. Supreme Court to limit how most courts and the federal government approach liability under CERCLA. The Court will consider this issue in its review of the consolidated decisions of *Burlington Northern & Santa Fe Railway Co. v. United States* and *Shell Oil Co. v. United States*.¹⁹⁴ These two cases contain challenges to the federal government on two issues: when so-called arranger liability can be imposed, and whether and when liability may be apportioned among multiple parties potentially liable for a cleanup.¹⁹⁵

188. *Id.* at *7 (citation omitted).

189. *Id.* at *16.

190. *Id.* at *4-5.

191. In an opinion outside the survey period, the Seventh Circuit affirmed the trial court’s decision. *Sycamore Indus. Park Assocs. v. Ericsson, Inc.*, 546 F.3d 847, 854 (7th Cir. 2008), *cert. denied*, 129 S. Ct. 2002 (2009).

192. The CERCLA statute does not state that liability is joint and several, and the question of whether that is what Congress intended has never been decided by the Supreme Court.

193. *See Metro. Water Reclamation Dist. v. N. Am. Galvanizing & Coatings, Inc.*, 473 F.3d 824, 827 (7th Cir. 2007) (“For . . . PRPs, liability under § 107(a) is strict, joint and several. In other words, by invoking § 107(a), the EPA may recover its costs in full from any responsible party, regardless of that party’s relative fault.”), *reh’g denied*.

194. Certiorari was granted by the Court in October 2008. *See Shell Oil Co. v. United States*, 129 S. Ct. 30 (2008); *Burlington N. & Santa Fe Ry. v. United States*, 129 S. Ct. 30 (2008). The lower court decision is *United States v. Burlington North & Santa Fe Railway Co.*, 520 F.3d 918 (9th Cir. 2008), *cert. granted*, 129 S. Ct. 30 (2008).

195. *Burlington*, 520 F.3d at 948. *Burlington* involves a cost recovery action brought by the EPA and a state environmental agency under CERCLA to recover costs spent to clean up contamination from land on which a defunct company, Brown & Bryant, Inc. (B & B), operated a

IV. OTHER DEVELOPMENTS IN ENVIRONMENTAL LAW

A. Courts Examine Use of Nuisance Claims for Environmental Contamination

Parties have increasingly sought to obtain funds to address environmental contamination by using nuisance claims. Indiana defines a nuisance as “[w]hatever is: (1) injurious to health; (2) indecent; (3) offensive to the senses; or (4) an obstruction to the free use of property; so as essentially to interfere with the comfortable enjoyment of life or property.”¹⁹⁶ An actionable nuisance is “an activity that generates injury or inconvenience to others that is both sufficiently grave and sufficiently foreseeable that it renders it unreasonable to proceed at least without compensation to those that are harmed.”¹⁹⁷ Nuisance law is divided into two categories: private nuisance and public nuisance.¹⁹⁸

In *City of Gary v. Shafer*,¹⁹⁹ the court scrutinized the use of nuisance claims for environmental contamination brought by current property owners against former owners of the same property.²⁰⁰ In particular, Gary sought damages from former property owners of property transferred to Gary as part of a settlement for tax liability under nuisance law.²⁰¹ Gary’s subsequent property investigations

facility that stored and distributed toxic chemicals. *Id.* at 930-32. Some of the land on which the chemical operation was located was owned by the defendant railroads, and some of the chemicals used by the company were supplied and delivered by the Shell Oil Company (Shell). *Id.* Because the operator of the facility was a defunct company, it could not contribute to the cleanup costs, and the environmental agencies sought to hold the railroad and Shell jointly and severally liable for the costs of the cleanup. *Id.* The district court refused to hold the companies jointly and severally liable, but the Ninth Circuit reversed, stating that “there was no reasonable basis for apportioning” the damages attributable to the railroads’ activity, the oil company, and the defunct company. *Id.* at 930, 937-48.

196. IND. CODE § 32-30-6-6 (2008).

197. *City of Gary v. Smith & Wesson*, 801 N.E.2d 1222, 1231 (Ind. 2003).

198. *See Wernke v. Halas*, 600 N.E.2d 117, 120 (Ind. Ct. App. 1992). Indiana courts have held that a private nuisance affects only a “single person or a determinate number of people.” *Id.* “The essence of a private nuisance is the use of property to the detriment of the use and enjoyment of another’s property.” *Id.* (citing *Cox v. Schlachter*, 262 N.E.2d 550, 553 (Ind. Ct. App. 1970)). On the other hand, a public nuisance is “caused by an unreasonable interference with a common right.” *Ind. Limestone Co. v. Staggs*, 672 N.E.2d 1377, 1384 (Ind. Ct. App. 1996). Generally, a public nuisance affects an entire community or neighborhood, while the effect of a private nuisance is peculiar to an individual or a limited number of individuals. *See Wendt v. Kerkhof*, 594 N.E.2d 795, 797 (Ind. Ct. App. 1992).

199. *City of Gary v. Shafer*, No. 2:07-CV-56-PRC, 2007 U.S. Dist. LEXIS 75503 (N.D. Ind. Oct. 4, 2007).

200. *Id.* at *7-24.

201. *Id.* at *13. Indiana nuisance law is codified at Indiana Code section 32-30-6-7 (2008). The City of Gary also sued under Gary Environmental Ordinance section 95.204, however, these claims were dismissed as the ordinances were retroactive and were passed after the contamination

revealed contamination, and Gary filed suit claiming that the conduct of various former property owners injured “the City’s Property and interfered with the City’s use and enjoyment of the Property.”²⁰² In rejecting Gary’s nuisance claim, the court concluded that Gary’s nuisance claim was for private nuisance, and not public nuisance, as Gary had not alleged any interference with a “common right” of the public but only harm to property owned by Gary.²⁰³ The court further noted that private nuisance actions are premised on the assumption that the parties to a nuisance do not have prior contractual relationships wherein their interests might have been resolved by agreement.²⁰⁴ As such, because Gary was a “purchaser” of the property at issue it could not bring a private nuisance claim against a former owner for property.²⁰⁵ The court further noted that a “purchaser,” was not limited to cash buyers, private entities, or individuals who obtain property through a conventional money transfer or purchase, but included any party who “obtains property from another for either money or other valuable consideration” or who has the ability to negotiate with a property’s owner/seller to account for any defects in the property.²⁰⁶

Shafer may limit the ability of Indiana property owners to pursue private nuisance claims against former owners of the same property, but it does not address the viability of public nuisance claims based on an interference with a “common right” likely to exist when groundwater, multiple or adjacent properties, or parks are contaminated. Even though *Shafer* is not binding on Indiana state courts, its holding may reduce the willingness of risk adverse municipalities to enter into tax settlements that allow individuals or corporations to reduce their tax liability by transferring potentially contaminated property to the municipality.

B. Court Jurisdiction to Review IDEM Actions for Confined Feeding Operations

In *Save the Valley, Inc. v. Ferguson*,²⁰⁷ the Indiana Court of Appeals held that it lacked subject matter jurisdiction to consider a lawsuit seeking private (as opposed to “in the name of the State of Indiana” under Indiana Code section 13-30-1-1)²⁰⁸ declaratory and injunctive relief for activity regulated by IDEM.²⁰⁹ At issue was IDEM’s grant of a permit to the defendant to construct a hog farm as a “confined feeding operation” (CFO) as defined in Indiana Code section 13-11-

at issue occurred. *Shafer*, 2007 U.S. Dist. LEXIS 75504, at *2-3.

202. *Shafer*, 2007 U.S. Dist. LEXIS 75503, at *9.

203. *Id.* at *8-9, *15-16.

204. *Id.* at *11-16 (citing *Lilly Indus. v. Health-Chem Corp.*, 974 F. Supp. 702, 706 (S.D. Ind. 1997)).

205. *Id.*

206. *Id.* at *13-17 (citing *Lilly*, 974 F. Supp. at 702).

207. 896 N.E.2d 1205 (Ind. Ct. App. 2008).

208. *Id.* at 1205 n.2 (citing IND. CODE § 13-30-1-1 (2008)).

209. *Id.* at 1207.

2-40.²¹⁰ Because CFOs require an IDEM permit before they can be constructed, and because IDEM is statutorily authorized to pursue injunctive relief, impose penalties, and to order corrective action, “it is clear that the Indiana General Assembly has charged IDEM with the responsibility of regulating potential harm from the operation of CFOs.”²¹¹ In the absence of a claim for damages, Indiana courts therefore lack subject matter jurisdiction to consider plaintiffs’ claims that the CFO had not been constructed within the two years of its permitting as required by law and that, if constructed, the CFO would irreparably harm their property.²¹²

C. Decisions Pertaining to Clean Water Act Regulations

The Clean Water Act (CWA),²¹³ among other things, regulates the discharge of pollutants and other materials into navigable waters and sets quality standards for surface waters.²¹⁴ One CWA case decided last year was *City of Portage v. South Haven Sewer Works, Inc.*,²¹⁵ in which the Indiana Court of Appeals held that the Indiana Utility Regulatory Commission improperly permitted the owner-operator of a wastewater collection and treatment system to expand its Certificate of Territorial Authority (CTA).²¹⁶ The expansion was improper because the owner-operator did not obtain the EPA’s advance consent, in violation of the unambiguous requirements of a consent decree previously entered against it.²¹⁷ In so ruling, the court rejected the Commission and the owner-applicant’s claim that the advance-consent requirement infringed upon Indiana’s Tenth Amendment authority to determine the geographical boundaries of utilities within its borders.²¹⁸ Because the owner-operator had voluntarily agreed to the consent decree and, in any event, the ultimate decision about whether to expand the CTA rested with the Commission so long as the prerequisites had been met, there was no infringement upon Indiana’s regulatory authority.²¹⁹

In the past year, the U.S. District Court for the Southern District of Indiana also issued an instructional opinion in *United States v. Hagerman*,²²⁰ where the court applied the federal sentencing guidelines to an executive convicted of violating the CWA. Under the CWA, the discharge of pollutants into navigable waters requires a permit.²²¹ Permit holders are required to test their effluents to

210. *Id.* at 1206 n.3.

211. *Id.* at 1206.

212. *Id.* at 1206-07.

213. 33 U.S.C. §§ 1251-1387 (2006).

214. *Id.* §§ 1311, 1313, 1344.

215. 880 N.E.2d 706 (Ind. Ct. App. 2008).

216. *Id.* at 712.

217. *Id.*

218. *Id.*

219. *Id.*

220. 525 F. Supp. 2d 1058 (S.D. Ind. 2007), *aff’d*, 555 F.3d 553 (7th Cir. 2009).

221. 33 U.S.C. §§ 1311(a), 1342 (2006).

determine whether they comply with their permit conditions, and to report the results of those tests.²²² At issue in *Hagerman* was the proper total offense level for a corporate executive convicted on ten counts of knowingly submitting a false testing report, each of which was a felony.²²³ Because the court found that the defendant's recordkeeping offenses were designed to conceal a substantive environmental offense, the Sentencing Guidelines called for the application of specific offense characteristics otherwise only applicable to substantive environmental crimes.²²⁴ The court rejected the defendant's claim that only the base offense level could be considered as this conflicted with the plain Guidelines instructions and holding otherwise would reward defendants whose successful fraudulent recordkeeping prevented prosecution for substantive CWA offenses.²²⁵ Further, it rejected the claim of an amicus curiae that the Sentencing Commission assigned unreasonably high punishments to CWA violations.²²⁶ After determining the total offense level, and adding additional levels required for the offender-specific portion of the calculation, the court sentenced the defendant to sixty months, within the Sentencing Guidelines range.²²⁷

*D. Attorneys Fees, Costs, and Punitive Damages in
the Environmental Context*

In *Greenfield Mills, Inc. v. Carter*,²²⁸ the U.S. District Court for the Southern District of Indiana ruled that fee awards were available under the CWA where one party has succeeded on the merits of at least some of its claims.²²⁹ *Greenfield Mills* is an opinion rendered in response to a plaintiff's motion for an interim award of attorneys' fees and costs after the Indiana Attorney General refused to approve a settlement with the plaintiff riparian owners and users of a downstream stretch of river who the court found had been adversely affected by dredging performed by the Indiana Department of Natural Resources.²³⁰

Although the *Greenfield Mills* opinion deals mainly with the technicalities of calculating attorney fee and cost awards, it is significant because it demonstrates that under the CWA, like other fee shifting statutes, interim fee awards may be made where one party has succeeded on the merits of at least some of its claims. The interim fee award under the CWA was particularly

222. *Id.* § 1318; 40 C.F.R. § 122.41 (2008).

223. *Hagerman*, 525 F. Supp. 2d at 1059-62; *see also* 33 U.S.C. § 1319(c)(4) (2006).

224. *Hagerman*, 525 F. Supp. 2d at 1062 (citing U.S. SENTENCING GUIDELINES MANUAL § 2Q1.2(b)(5) (2009)).

225. *Id.* at 1062-63.

226. *Id.* at 1064-65.

227. *Id.* at 1065-66. In an opinion outside the period covered by this Survey, the Seventh Circuit affirmed the trial court's sentence and decision to admit into evidence copies of test results from the defendant's employees. *United States v. Hagerman*, 555 F.3d 553 (7th Cir. 2009).

228. 569 F. Supp. 2d 737 (N.D. Ind. 2008).

229. *Id.* at 743.

230. *Id.* at 741-43.

justified in this case because plaintiffs had obtained substantial relief and caused a permanent change in policy and law, not only by persuading defendants to stipulate to a permanent injunction enjoining them from operating dams or other structures in a manner that violated the CWA, but also by affecting a change in national policy whereby the U.S. Army Corps of Engineers issued guidance to governmental agencies regarding releases of sediments by or through dams.²³¹ Thus, given the demonstrable damage suffered by the plaintiffs, the implications of the case, the time elapsed during the litigation, and the disparate resources of the parties, the court found an interim fee award pursuant to the Clean Water Act appropriate.²³² In fact, the court went so far as to state that the failure to grant the fee petition would be an abuse of discretion given the facts of this particular matter.²³³

In another decision stemming from a petition for attorney fees and costs, *Wickens v. Shell Oil Co.*,²³⁴ the U.S. District Court for the Southern District of Indiana also awarded corrective action costs, attorneys' fees and court costs to the prevailing party under Indiana's USTA.²³⁵ After protracted and highly contentious litigation, the parties successfully negotiated a settlement on the merits, but left for the court's resolution the amount of corrective action costs and attorneys' fees plaintiff could recover.²³⁶

Ultimately, the court determined that both investigative and remedial expenses were recoverable "corrective action costs" under the USTA.²³⁷ The court awarded plaintiffs a judgment for his environmental consultant's invoices less amounts expended on "litigation support" activities and amounts incurred during a period when the court ordered no additional fees or costs be incurred without a showing of clear necessity, which had not been made.²³⁸ The court likewise awarded attorneys' fees and court costs, engaging in a lengthy analysis of the submitted invoices and the parties' positions regarding the amounts requested.²³⁹ The court concluded that although plaintiff could recover the amounts previously deducted from the consultant's invoices as recoverable litigation support disbursements, attorneys' fees for pursuit of non-USTA claims were not recoverable, nor were fees incurred after the time when Shell made it clear it was willing to assume full responsibility for the site efforts, as after that

231. *Id.* at 743-44.

232. *Id.*

233. *Id.* at 744.

234. 569 F. Supp. 2d 770 (S.D. Ind. 2008), *modified by* 2009 WL 1582971 (S.D. Ind. June 3, 2009).

235. *Id.* at 793-95. The USTA is codified at Indiana Code sections 13-23-1-1 to -16-4 (2008).

236. *Greenfield Mills*, 569 F. Supp. 2d at 773-84. The court's analysis was complicated by several factors, including the fact that plaintiff's environmental consultant undertook testing of a neighboring property without any directive requiring it to do so, the generally contentious nature of the litigation, and the combative stances taken by counsel. *See id.*

237. *Id.* at 783-84.

238. *Id.* at 784-88.

239. *Id.* at 788-95.

point plaintiff's counsel only benefited from prolonging the litigation.²⁴⁰ Finally, the court denied any award of prejudgment interest because a good faith dispute existed as to the reasonable amount of attorneys' fees and costs.²⁴¹

In an issue of first impression, the U.S. Supreme Court held in *Exxon Shipping Co. v. Baker*,²⁴² that the CWA's water pollution penalties did not preempt punitive damages in maritime spill cases, but that punitive damages in maritime law should be subject to a one-to-one ratio, thus capping punitive damages at an amount equal to compensatory damages.²⁴³ However, the Court was equally divided on the issue of whether maritime law allows corporate liability for punitive damages for the acts of managerial agents.²⁴⁴ As a result, the Court left the court of appeals decision undisturbed on that issue.²⁴⁵

E. Developments in Indiana Environmental Insurance Law

During the survey period, the Indiana Supreme Court granted transfer in two cases that raise a number of important insurance coverage issues (such as policy assignment and notice requirements) that often come up when policyholders make claims in environmental cases involving soil and/or groundwater contamination.

The Indiana Supreme Court will first consider *Dreaded, Inc. v. St. Paul Guardian Insurance Co.*, in which the Indiana Court of Appeals reversed the trial court's grant of summary judgment in favor of an insurer due to delayed notice of a claim to the insurer.²⁴⁶ Dreaded, Inc. (Dreaded) sought reimbursement of defense costs for an environmental liability claim incurred prior to notifying its general liability insurer of the claim.²⁴⁷ Dreaded received a suit letter from IDEM on November 17, 2000, and took steps to respond, including hiring legal counsel and an environmental consultant, but did not tender the claim to its liability insurer until March 24, 2004.²⁴⁸ Both the trial court and the court of appeals found that Dreaded's delay in notifying its insurer was unreasonable and thus, that a presumption existed that the insurer was prejudiced by the delay.²⁴⁹

However, unlike the trial court, the court of appeals held that the evidence

240. *See id.* at 790-95.

241. *Id.* at 795.

242. 128 S. Ct. 2605 (2008). *Baker* stems from the 1989 Exxon Valdez environmental disaster. *Id.* at 2608. A jury awarded the class plaintiffs \$507.5 million in compensatory damages and \$4.5 billion in punitive damages, reduced by the Ninth Circuit Court of Appeals to \$2.5 billion. *Id.* at 2608-11.

243. *Id.* at 2633.

244. *Id.* at 2616.

245. *Id.* at 2634.

246. *Dreaded, Inc. v. St. Paul Guardian Ins. Co.*, 878 N.E.2d 467, 474 (Ind. Ct. App. 2007) *trans. granted*, 891 N.E.2d 48 (Ind. 2008), *vacated*, 904 N.E.2d 1267 (Ind. 2009).

247. *Id.* at 469-70.

248. *Id.*

249. *Id.* at 469, 472-73.

designated by Dreaded was sufficient to raise a genuine issue of material fact as to prejudice to the insurer, precluding summary judgment.²⁵⁰ Specifically, Dreaded set forth evidence demonstrating that once the insurer received notice, it continued to defend the claim just as Dreaded had and that the actions taken were appropriate and necessary to defend against the environmental liability claim.²⁵¹ As a result, the issue of whether the insurer was prejudice by the late notice was one for the trier of fact and summary judgment on that issue was not warranted.²⁵² The court of appeals thus affirmed the trial court's finding that the insured's delay was unreasonable, but reversed as to the issue of prejudice and remanded the case for further proceedings.

The Indiana Supreme Court also agreed to review the Indiana Court of Appeals' decision in *Travelers Casualty & Surety Co. v. United States Filter Corp.*,²⁵³ a case that raises issues pertaining to the assignment of policies. *U.S. Filter* involved a situation where five companies sought insurance coverage for bodily injury claims involving the operation of industrial blast machines.²⁵⁴ The Indiana Supreme Court issued an opinion after the survey period holding that the policies were not properly transferred.²⁵⁵ A full analysis of this opinion, and the underlying facts, will be addressed in next year's article.

CONCLUSION

The cases in this survey period reflect the changing priorities of environmental law. In many ways the law was clarified, as with the *Pflanz* clarification of the statute of limitations period for the USTA. Yet, in others, and in particular with the CAA, court decisions have left many areas of environmental regulation up in the air. As such, the contours of environmental obligations are in many ways in flux, with the CAA regulations exemplifying the inherent difficulties in developing consistent and equitable standards necessary to move forward in protecting our environment.

250. *Id.* at 473-74.

251. *Id.* at 474.

252. *Id.* at 473-74.

253. *Travelers Cas. & Sur. Co. v. U.S. Filter Corp.*, 870 N.E.2d 529 (Ind. Ct. App.), *trans. granted*, 878 N.E.2d 222 (Ind. 2007), *vacated*, 895 N.E.2d 1172 (Ind. 2008).

254. *Id.* at 533-39.

255. *Travelers Cas. & Sur. Co.*, 895 N.E.2d 1172, 1180-81 (Ind. 2008).

SURVEY OF RECENT DEVELOPMENTS IN HEALTH CARE LAW

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INTRODUCTION

Healthcare in Indiana, as in the rest of the United States, is governed by an evolving and changing body of law, both state and federal, covering a vast number of topics. Although not an exhaustive review, this Survey summarizes recent developments in various areas of health law including: fraud and abuse, quality, tax, reimbursement, and labor and employment.

I. GENERAL HEALTH LAW

In 2008, there were several interesting cases impacting health care providers. Two notable cases include *Poliner v. Texas Health System*¹ and *United States ex rel. Bates and Patrick v. Kyphon, Inc.*² involving peer review and a *qui tam* complaint, respectively. These cases are summarized below.

A. Peer Review

The 2007 *Survey of Recent Developments in Health Law* in the *Indiana Law Review* reported on the decisions from a district court in Texas in the *Poliner v. Texas Health System*³ case, and described the dramatic impact these decisions had on the landscape of peer review.⁴ However, following publication of the 2007 Survey, the defendants appealed to the Fifth Circuit.⁵ The court issued a decision reversing the district court on July 23, 2008.⁶

Poliner is based upon a lawsuit with numerous claims brought by Lawrence Poliner, M.D. and his professional corporation against Texas Health Systems and several physicians, alleging that the defendants “improperly and maliciously used the peer-review process to summarily suspend [his] privileges, thereby causing damage to his interventional cardiology practice.”⁷ In September 2003, the United States District Court for the Northern District of Texas, Dallas Division, “granted in part and denied in part [d]efendants’ motion for summary judgment

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1. 537 F.3d 368 (5th Cir. 2008), *cert. denied*, 129 S. Ct. 1002 (2009).

2. No. 05-CV-6568CJS(f) (W.D.N.Y., filed Oct. 25, 2005).

3. 537 F.3d 368 (5th Cir. 2008), *cert. denied*, 129 S. Ct. 1002 (2009).

4. Ice Miller LLP, *Survey of Recent Developments in Health Law*, 40 IND. L. REV. 931, 946-51 (2007).

5. *Poliner*, 537 F.3d at 375.

6. *Id.* at 384.

7. *Poliner v. Tex. Health Sys.*, No. Civ. A.3:00-CV-1007-P, 2006 WL 770425, at *1 (N.D. Tex. 2006), *rev’d*, 537 F.3d 368 (5th Cir. 2008), *cert. denied*, 129 S. Ct. 1002 (2009).

on all of [p]laintiffs' claims."⁸ The claims not dismissed on summary judgment were submitted to a jury, who found that defendants' actions were not immune from civil liability under the federal Health Care Quality Improvement Act (HCQIA) or state peer review statutes, and in favor of plaintiffs on all of their other claims.⁹ "The jury awarded compensatory and exemplary damages against [d]efendants in the total amount of \$366,211,159.30."¹⁰

Following an unsuccessful mediation, plaintiffs moved to have the judgment entered, and the defendants moved to renew their motion for judgment notwithstanding the verdict, arguing that the defendants were entitled to immunity under the HCQIA or state peer review statutes.¹¹ The court found that sufficient evidence existed in support of the jury's decision that the defendants were not entitled to immunity under HCQIA or state law.¹² The court, in a separate order, addressed the defendants' motion for a new trial and remittitur, but ultimately denied the motion for a new trial.¹³ Although the motion was denied, the court did reduce the verdict to approximately \$22.5 million, because it found the jury's verdict to be excessive.¹⁴

The United States Court of Appeals for the Fifth Circuit later reversed the lower court's decision on based on the defendants being entitled to immunity under the HCQIA.¹⁵ The court held, "Because [d]efendants are immune under the HCQIA, we have no occasion to consider [d]efendants' other substantial arguments that we must reserve and render judgment based on state law immunity and because Poliner failed to prove the substantive elements of his claims."¹⁶

In arriving at the decision that the defendants were immune under the HCQIA, the court examined the factors set out in HCQIA¹⁷ and concluded that the professional review actions taken by the defendants were done "in the reasonable belief that the action was in the furtherance of quality health care," that defendants made "a reasonable effort to obtain" the facts, that defendants satisfied the notice and hearing requirements, and that the peer review action taken by defendants was taken "in the reasonable belief that the action was warranted by the facts known after such reasonable effort to obtain facts."¹⁸ The court elaborated on the application of these elements, stating that (1) the HCQIA

8. *Id.*

9. *Id.* at *2.

10. *Id.*

11. *Id.*

12. *Id.* at *5.

13. *See Poliner v. Tex. Health Sys.*, 239 F.R.D. 468 (N.D. Tex. 2006), *rev'd*, 537 F.3d 368 (5th Cir. 2008), *cert. denied*, 129 S. Ct. 1002 (2009).

14. *Id.* at 478.

15. *Poliner v. Tex. Health Sys.*, 537 F.3d 368, 385 (5th Cir. 2008), *cert. denied*, 129 S. Ct. 1002 (2009).

16. *Id.* at 385 (footnote omitted).

17. *Id.* at 376-77 (citing 42 U.S.C. § 1112(a) (2006)).

18. *See id.* at 378-85.

was “intended to create an objective standard of performance, rather than a subjective good faith standard,”¹⁹ (2) HCQIA does not require that the peer review action result in an actual improvement in the quality of care,²⁰ (3) the “good or bad faith of the reviewers is irrelevant,”²¹ (4) an ultimate decisionmaker is not required to investigate the matter independently but is only required to make a “reasonable effort to obtain the facts,”²² and (5) “HCQIA immunity is not coextensive with compliance with an individual hospital’s bylaws.”²³ Poliner appealed, but on March 23, 2009, the United States Supreme Court denied the certiorari.²⁴

The most recent *Poliner* decision provides some reassurance for health care providers in that immunity under the HCQIA can be extended to those who perform professional review actions which conform to the applicable standards and serve as a shield from damages. The decision applies the presumption found in § 11112(a) of title 42²⁵ that “a professional review action shall be presumed to have met the [applicable standards] . . . unless the presumption is rebutted by a preponderance of the evidence.”²⁶

B. Medtronic-Kyphon Settlement

One of the most interesting False Claims Act²⁷ cases impacting healthcare providers in 2008 is the Medtronic settlement.²⁸ The settlement demonstrates the risks associated with a healthcare provider’s reliance on reimbursement advice from a medical device manufacturer.²⁹

On October 25, 2005, former Kyphon employees Charles Bates, III and Craig Patrick filed a *qui tam* complaint against Kyphon, Inc.³⁰ alleging violations of the False Claims Act.³¹ Bates and Patrick later amended the complaint to include

19. *Id.* at 376.

20. *Id.* at 378.

21. *Id.* (quoting *Brader v. Allegheny Gen. Hosp.*, 167 F.3d 832, 840 (3d Cir. 1999)).

22. *Id.* at 380 (internal quotes omitted).

23. *Id.*

24. *Poliner v. Tex. Health Sys.*, 129 S. Ct. 1002 (2009) (mem.).

25. *See Poliner*, 537 F.3d at 377.

26. 42 U.S.C. § 11112(a) (2006).

27. 31 U.S.C. § 3729 (2006).

28. Subsequent to the filing of the *qui tam* action, Kyphon was acquired by Medtronic in 2007.

29. DEP’T OF JUSTICE, MEDTRONIC SPINE, FORMERLY KYPHON, INC., TO PAY U.S. \$ 75 MILLION TO RESOLVE ALLEGATIONS OF DEFRAUDING MEDICARE (2008), *available at* <http://www.usdoj.gov/opa/pr/2008/May/08-civ-455.html>.

30. *United States ex rel. Bates & Patrick v. Kyphon*, No. 05-CV-6568CJS(f) (W.D.N.Y., filed Oct. 25, 2005). Subsequent to the filing of the *qui tam* action, Kyphon was acquired by Medtronic in 2007.

31. *Id.*

claims against Sisters of Charity Hospital.³² Bates was a former Kyphon sales representative while Patrick was a former Kyphon reimbursement manager.³³ According to the *qui tam* complaint, Kyphon illegally marketed its kyphoplasty procedure by encouraging physicians to perform the procedure and to claim reimbursement unnecessarily treating the procedure as an inpatient service.³⁴

The lawsuit described kyphoplasty as a minimally-invasive surgery used to treat vertebral compression fractures most commonly caused by osteoporosis in the elderly population.³⁵ The kyphoplasty restores the size and strength of the fractured, collapsed vertebra. According to the complaint, the procedure involves the insertion of an inflatable balloon into the vertebra in order to restore partially vertical height and to create a cavity in which to inject a viscous bone cement.³⁶ The cement in turn strengthens the broken vertebra, secures the vertebra in its original height and position, and supports the surrounding bone to prevent further collapse.³⁷ This procedure is usually performed by orthopedic surgeons and interventional radiologists under general anesthesia or conscious sedation.³⁸ Kyphoplasty can generally be done on an outpatient basis and inpatient stays are only expected in rare cases where the patient is frail or other medical issues require further monitoring following the procedure.³⁹

Despite the minimal invasiveness of the procedure, the complaint alleged that approximately eighty-ninety percent of the 150,000 kyphoplasty procedures performed from 1999 to 2005 were unnecessarily performed as inpatient, rather than outpatient, procedures as a result of Kyphon's misleading marketing practices.⁴⁰

On May 20, 2008, Medtronic Spine, LLC (Medtronic) announced a \$75 million settlement of the *qui tam* lawsuit.⁴¹ In addition to paying the \$75 million fine, Medtronic also agreed, as part of the settlement, to enter into a corporate integrity agreement (Agreement) with the United States Department of Human Services, Office of Inspector General.⁴² The Agreement contained measures to ensure compliance with Medicare regulations and policies in the future.⁴³ As a result of the settlement, the *qui tam* relators received a total of \$14.9 million as their statutory share of the proceeds.⁴⁴ The Medtronic-Kyphon settlement ranks

32. First Amended Complaint at 1, *United States ex rel. Bates & Patrick v. Kyphon, Inc. and Sisters of Charity Hospital*, No. 05-CV-6568CJS(f) (W.D.N.Y., filed Jan. 5, 2006).

33. *Id.* ¶¶ 14-17.

34. *Id.* ¶ 4.

35. *Id.* ¶¶ 54-59.

36. *Id.* ¶¶ 64-65.

37. *Id.* ¶¶ 65-66.

38. *Id.* ¶ 21.

39. *Id.* ¶ 68.

40. *Id.* ¶ 5.

41. *See* DEP'T OF JUSTICE, *supra* note 29.

42. *Id.*

43. *Id.*

44. *Id.*

as the fifty-eighth largest False Claims Act settlement to date.⁴⁵

II. FRAUD & ABUSE

A. *Stark IV*

On August 19, 2008, the Centers for Medicare & Medicaid Services (CMS) issued the final Hospital Inpatient Prospective Payment Systems rule for fiscal year 2009 (Final Rule) which, in part, finalized several new Stark regulations.⁴⁶

1. *Changes to Physician “Stand in the Shoes” Regulations.*—In the Stark Phase III final regulations effective December 4, 2007, CMS implemented a “stand in the shoes” rule under which referring physicians were treated as standing in the shoes of their physician organization for purposes of applying the direct and indirect compensation exceptions.⁴⁷ As a result, many compensation arrangements between entities providing designated health services (DHS) and physician groups that previously were indirect compensation arrangements or did not meet the definition of an indirect compensation arrangement under Stark (and thus may not have been subject to Stark at all), were treated as direct compensation arrangements between the DHS entities and the groups’ referring physicians.⁴⁸ Therefore, these arrangements were required to be restructured in order to satisfy all of the elements of a direct compensation exception.⁴⁹

In an attempt to simplify the application of the stand in the shoes regulations in the Final Rule, CMS finalized revisions to the physician “stand in the shoes” provisions that deem a physician who has an *ownership or investment interest* in a physician organization to “stand in the shoes” of that physician organization.⁵⁰ Physicians with only a “titular” ownership interest—physicians that do not have the “ability or right to receive the financial benefits of ownership or investment, . . . [such as] the distribution of profits, dividends, proceeds of sale, or similar returns on investment”—and non-owner physician employees or independent contractors would not be deemed to “stand in the shoes” of their physician organizations.⁵¹ Further, CMS clarified that the physician “stand in the shoes” provisions do not apply to arrangements that satisfy the academic medical centers exception.⁵²

Nonetheless, in the preamble to the Final Rule, CMS noted that the revised regulations *permit* non-owner physicians and titular owners to stand in the shoes

45. Top 100 False Claims Act Cases, <http://www.taf.org/top100fca.htm> (last visited July 5, 2009).

46. Changes to Disclosure of Physician Ownership in Hospitals and Physician Self-Referral Rules, 73 Fed. Reg. 48,434, 48,688–48,754 (Aug. 19, 2008) (to be codified at C.F.R. pt. 411).

47. *Id.* at 48,695 (citing 42 C.F.R. § 411.357(p) (2008)).

48. *Id.*

49. *Id.*

50. *Id.* at 48,753 (to be codified at 42 C.F.R. § 411.354(c)(1)(ii)).

51. *Id.* (to be codified at 42 C.F.R. § 411.354(c)(3)(ii)(C)).

52. *Id.* at 48,698.

of their physician organizations.⁵³ Per CMS, the purpose of this “permissive” regulation is to allow parties the flexibility to structure compensation arrangements in a manner that satisfies a direct compensation arrangement (as opposed to an indirect compensation arrangement exception or no exception at all) in order to comply with Stark.⁵⁴ CMS indicated that it believes that “[t]his approach is consistent with [its] longstanding view that parties are entitled to use any available exception of which they satisfy all of the applicable requirements.”⁵⁵

CMS noted that as a result of the Phase III “stand in the shoes” rule, many arrangements between DHS entities and physician organizations had to be restructured or initially structured by December 4, 2007, to meet an exception for direct compensation arrangements.⁵⁶ Accordingly, in the Final Rule, CMS clarified that “such arrangements do not need to be restructured” again to comply with the revised stand in the shoes regulations until the expiration of the original term or renewal term of the agreement.⁵⁷ Additionally, the parties can elect to continue having the non-owner physicians stand in the shoes of their physician organization, as was required under Stark III, in order to avoid restructuring an arrangement.⁵⁸

2. *New Limitations Placed on Services Performed for Hospitals and Other DHS Entities (including “Under Arrangements”).*—The Stark law prohibits both a physician from making referrals for DHS to an entity with which the physician (or an immediate family member) has a financial relationship and prohibits the entity from billing Medicare for the DHS, unless an exception applies.⁵⁹ Under the Phase I definition of “entity,” an “entity” includes only the person or entity that *bills* Medicare for the DHS—not the person or entity that performs the DHS where such person or entity—is not also the person or entity billing for it.⁶⁰

In this version of the Final Rule, CMS amended the definition of “entity” to clarify that a person or entity is considered to be “furnishing” DHS if it “[i]s the person or entity that has *performed*” the DHS (notwithstanding that such entity did not actually bill the services).⁶¹ Note that where an “under arrangements” service provider “performs” a service that is billed by another entity, both the “under arrangements” service provider and the billing entity are DHS entities with respect to that service.⁶² CMS does not define “perform” specifically, but it appears that the “hands-on” medical or clinical work would fall under this

53. *Id.* at 48,690.

54. *Id.* at 48,695.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. 42 U.S.C. § 1395nn(a)(1) (2006).

60. 42 C.F.R. § 411.351 (2008).

61. Changes to Disclosure of Physician Ownership in Hospitals and Physician Self-Referral Rules, 73 Fed. Reg. at 48,751 (to be codified at 42 C.F.R. § 411.351) (emphasis added)).

62. *Id.* at 48,721.

umbrella.

Thus, where an “under arrangements” service provider (e.g., a joint venture, physician group practice, or other physician organization) “performs” the services and, pursuant to a contractual arrangement, a hospital bills for those services, the services are DHS and the “under arrangements” service provider would be a DHS entity with respect to those services.⁶³ If the referral to the “under arrangements” service provider is made by a physician owner or investor in such provider, an ownership exception must be met to protect the referral.⁶⁴

CMS delayed the effective date of the amendment to the definition of “entity” until October 1, 2009, in order to afford parties adequate time to restructure arrangements.⁶⁵

3. Percentage-Based Compensation Arrangements Prohibited for Office Space and Equipment Lease Arrangements Only.—In the Final Rule, CMS revised the rental of office space,⁶⁶ rental of equipment,⁶⁷ fair market value compensation arrangement exceptions⁶⁸ (all of these are “direct” exceptions), and the indirect compensation arrangement exception⁶⁹ to prohibit the use of compensation formulae based on “[a] percentage of the revenue raised, earned, billed, collected, or otherwise attributable to the services performed or business generated” in leased space or by the use of leased equipment.⁷⁰

In the Final Rule, CMS clarified that it does not consider these changes in the Final Rule to prohibit the imposition or levy of a percentage of expenses (e.g., property taxes or utilities) by a third party or a lessor from charging a lessee a pro rata share of *expenses* incurred that are attributable to that portion of the medical office building or other space or equipment that is leased by a lessee.⁷¹ Although CMS only finalized the percentage-based compensation formulae prohibition with respect to space and equipment leases (the prohibition was not extended to arrangements for non-professional services such as management or billing services), CMS intends to continue monitoring percentage-based compensation arrangements between DHS entities and physicians and may further restrict such arrangements as appropriate.⁷²

CMS noted that the Final Rule’s restrictions on the use of percentage-based compensation formulae for determining rental charges for the lease of space and equipment “may require the restructuring or termination of arrangements for the rental of space and equipment.”⁷³ Therefore, CMS has delayed the effective date

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.* at 48,752 (to be codified at 42 C.F.R. § 411.357(a)).

67. *Id.* (to be codified at 42 C.F.R. § 411.357(b)).

68. *Id.* (to be codified at 42 C.F.R. § 411.357(l)).

69. *Id.* (to be codified at 42 C.F.R. § 411.357(p)).

70. *Id.* (to be codified at 42 C.F.R. § 411.357(a)).

71. *Id.* at 48,711.

72. *Id.* at 48,710.

73. *Id.* at 48,713.

of these regulations until October 1, 2009.⁷⁴

4. *Restrictions on Unit-of-Service (Per-Click) Payments in Space and Equipment Lease Arrangements.*—CMS revised the lease exceptions for office space and equipment, the fair market value exception, and the exception for indirect compensation arrangements to provide that Unit of Service (per-click) rental charges are not allowed “to the extent that such charges reflect services provided to patients referred [by the lessor to the lessee].”⁷⁵ The rulemaking clearly articulates,

The prohibition on per-click payments for space or equipment used in the treatment of a patient referred to the lessee by a physician applies regardless of whether the physician is the lessor or whether the lessor is an entity in which the referring physician has an ownership or investment interest. The prohibition also applies where the lessor is a DHS Entity that refers patients to a physician lessee or a physician organization lessee.⁷⁶

CMS delayed the effective date of these amendments until October 1, 2009, in order to afford parties adequate time to restructure arrangements.⁷⁷

5. *Expansion of Obstetrical Malpractice Insurance Subsidy Arrangements.*—In the Final Rule, CMS revised this exception by separating it into two subsections. First, section 411.357(r)(1) retains the provisions of the current exception.⁷⁸ New section 411.357(r)(2) allows hospitals, federally qualified health centers, and rural health clinics to provide an obstetrical malpractice insurance subsidy to a physician who regularly “engages in obstetrical practice as a routine part of his or her medical practice” that is: (1) “located in a rural area, primary care HPSA, rural area, or an area with a demonstrated need . . . as determined by the Secretary in an advisory opinion”; or (2) is comprised of patients “[a]t least [seventy-five] percent of the physician’s obstetrical patients reside in a medically underserved area or are part of a medically underserved population.”⁷⁹

6. *Ownership or Investment Interest in Retirement Plans.*—CMS revised the definition of ownership or investment interest out of concern that physicians may be using retirement plans as a vehicle “to purchase or invest in other entities . . . to which they refer patients for DHS.”⁸⁰

7. *Outer Limits on the Period of Disallowance.*—In the Final Rule, CMS provided that the “period of disallowance” begins when the “financial relationship fails to satisfy the requirements of an applicable exception.”⁸¹ A

74. *Id.*

75. *Id.* at 48,752 (to be codified at 42 C.F.R. § 411.357(b)).

76. *Id.* at 48,714.

77. *Id.*

78. *Id.* at 48,753 (to be codified at 42 C.F.R. § 411.357(r)(1)).

79. *Id.* (to be codified at 42 C.F.R. § 411.357(r)(2)(B)).

80. *Id.* at 48,737.

81. *Id.* at 48,700.

period of disallowance is the time in which a physician cannot refer DHS to an entity and an entity cannot bill Medicare because the financial relationship between the referring physician and the entity fails to meet all of the requirements of a Stark exception.⁸² When noncompliance is not due to a compensation matter, the period of disallowance ends when “the financial relationship satisfies all of the requirements of the applicable exception.”⁸³ In cases where the noncompliance is tied to compensation, the period of disallowance ends no later than the date on which all “excess compensation is returned to the party that paid it,” or the date on which all “additional required compensation is paid to the party to which it is owed.”⁸⁴

8. *Alternative Method for Compliance and New Guidance on Missing Signatures.*—The Final Rule also created a new paragraph to section 411.353, which provides that “payment may be made to an entity that submits a claim or bill for [DHS] if” the financial relationship between the entity and the referring physician “fully complied with an applicable exception [under section 411.357], except with respect to the signature requirement,” and provided that the necessary signatures are obtained within ninety days of the commencement of the financial relationship if the failure to comply with the signature requirement was “inadvertent,” or within thirty days if the failure to comply was “not inadvertent.”⁸⁵

In order to take advantage of the alternative method for compliance in section 411.353(g), the financial relationship at issue must satisfy all of the requirements of the applicable exception at the commencement of the financial relationship.⁸⁶ An entity may use this alternative method of compliance only once every three years with respect to the same referring physician.⁸⁷

9. *Claimants Bear Burden of Proof for Claims Denied Based on Prohibited Referrals.*—CMS finalized its proposal to clarify existing Medicare regulations to provide that,

in any appeal of a denial of payment for [DHS] that was made on the basis that the DHS was furnished pursuant to a prohibited referral [under Stark], the burden is on the [DHS] entity submitting the claim for payment to establish that the service was *not* furnished pursuant to a prohibited referral [under Stark].⁸⁸

In the Final Rule, CMS noted that this new regulation—section 411.353(c)(2)—clarifies that “in any case in which a claim is denied for failure to comply with [Stark], the ultimate burden of proof (that is, the burden of persuasion) is on the claimant to demonstrate compliance and not on [CMS or its

82. *See id.*

83. *Id.*

84. *Id.*

85. *Id.* at 48,751 (to be codified at 42 C.F.R. § 411.353(g)).

86. *Id.* (to be codified at 42 C.F.R. § 411.353(g)(1)(i)).

87. *Id.* (to be codified at 42 C.F.R. § 411.353(g) (2)).

88. *Id.* at 48,738 (to be codified at 42 C.F.R. § 411.353(c)(2)).

contractors] to demonstrate noncompliance.”⁸⁹ In the preamble, CMS clarified that the burden of proof rules relate only to the administrative appeals of Medicare claims denials under the appeals process.⁹⁰ Appeals of civil monetary penalties, exclusions or other remedies imposed based on a determination that a DHS entity or a physician knowingly violated the Stark Law involve other appeal processes that are not subject to this rule.⁹¹

10. Disclosure of Financial Relationships Report.—In the Final Rule, CMS also provided an update on the status of the “Disclosure of Financial Relationships Report” (DFRR).⁹² The DFRR arose out of the Stark Law and its implementing regulations.⁹³ In September 2007, CMS intended to send a mandatory DFRR to 500 specialty and general hospitals for the purpose of collecting information to be used analyzing the investment, ownership, and compensation relationships with regard to the hospitals and its physicians.⁹⁴ The mandatory disclosure process would have followed the previous year’s voluntary disclosure process, distributed to hospitals pursuant to the Deficit Reduction Act of 2006 (DRA).⁹⁵ However, prior to distribution of the mandatory DFRR, CMS was required to obtain approval from the Office of Management and Budget (OMB) and had been in discussions with OMB since late last year.⁹⁶

In the Final Rule, CMS indicated that it will proceed with its proposal to send the DFRR to 500 hospitals (both general acute care hospitals and specialty hospitals).⁹⁷

However, based on further review and comments [that CMS] may receive in response to the revised [Paperwork Reduction Act (PRA)] package that will be published separately in the Federal Register [at some later date], [CMS] may decide to decrease (but not increase) the number of hospitals [to which it will] send the DFRR.⁹⁸

Importantly, CMS did not adopt a regular reporting or disclosure process at this time, and thus, the DFRR will be used, for the time being, as a “one-time collection effort.”⁹⁹ CMS did, however, adopt its proposal that “the DFRR be completed, certified by the appropriate officer of the hospital, and received by [CMS] within [sixty] days of the date that appears on the cover letter or email

89. *Id.* at 48,739.

90. *Id.*

91. *Id.*; see also 42 C.F.R. § 411.353(c) (2008).

92. See *id.* at 48,740-41.

93. *Id.* at 48,740.

94. *Id.* at 48,740-41.

95. Deficit Reduction Act of 2005, Pub. L. No. 109-171, 120 Stat. 4 (2006) (codified as amended in scattered titles and sections of U.S.C.).

96. Changes to Disclosure of Physician Ownership in Hospitals and Physician Self-Referral Rules, 73 Fed. Reg. at 48,745.

97. *Id.* at 48,743.

98. *Id.*

99. *Id.* at 48,744.

transmission of the DFRR.”¹⁰⁰ This is an increase from the original forty-five day required response time.

Failure to respond to the DFRR could result in a civil monetary penalty.¹⁰¹ However, prior to imposing such a penalty of up to \$10,000 for each day beyond the timeframe established for a response, CMS agreed to issue a letter to any hospital that does not return the completed DFRR.¹⁰² The letter will inquire as to why the hospital did not timely return the completed DFRR.¹⁰³ “In addition, a hospital may, upon a demonstration of good cause, receive an extension of time to submit the requested information.”¹⁰⁴

B. OIG Actions

1. Advisory Opinion 08-01.—On January 28, 2008, the U.S. Department of Health and Human Services, Office of Inspector General (OIG) issued Advisory Opinion 08-01.¹⁰⁵ This was the first advisory opinion addressing the application of the anti-kickback statute to bulk replacement patient assistance programs (PAPs). Based on the specific facts of the arrangement, the OIG determined that while the arrangement raised a potential compliance risk as a possible inducement, it would still be approved due to the presence of several safeguards.¹⁰⁶

PAPs “have long provided important safety net assistance to patients of limited means who do not have insurance coverage for drugs, typically serving patients with chronic illnesses and high drug costs.”¹⁰⁷ The arrangement involved a non-profit, tax-exempt corporation (Partnership) that served “as a liaison between the pharmaceutical industry and free clinics and FQHCs [federally qualified health centers] to improve access to free pharmaceutical products for low-income persons” by participating in “various bulk replacement [PAPs] sponsored by pharmaceutical companies that provide in-kind donations in the form of free drugs.”¹⁰⁸

The Partnership sought to create an arrangement to make it easier for pharmaceutical companies to offer their bulk replacement PAPs to free clinics and FQHCs.¹⁰⁹ First, the Partnership limited utilization of the PAP drugs to uninsured patients with income below 200 percent of the federal poverty limit

100. *Id.* at 48,741.

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. OIG Advisory Opinion No. 08-01 (Jan. 28, 2008), *available at* <http://www.oig.hhs.gov/fraud/docs/advisoryopinions/2008/AdvOpn08-01C.pdf>

106. *Id.* at 2, 12.

107. OIG Special Advisory Bulletin on Patient Assistance Programs, 70 Fed. Reg. 70,623, 70,623-24 (Nov. 22, 2005).

108. OIG Advisory Opinion No. 08-01, *supra* note 104, at 2.

109. *Id.*

(including Medicare beneficiaries who are not enrolled in Part D).¹¹⁰ Second, the Partnership imposed uniform PAP operating standards on participating companies, which included: (1) maintaining separate, auditable records for all PAP drugs; (2) maintaining systems for separating PAP inventory from other purchased products; (3) implementing a computerized dispensing system that will generate electronic reports for monitoring compliance with the Partnership requirements; and (4) agreeing to submit to annual on-site compliance audits.¹¹¹ Additionally, the arrangement prohibited the free clinics and FQHCs from “selling any donated PAP drugs and from transferring any PAP drugs to any third party other than the qualifying patients.”¹¹² Finally, the arrangement required the Partnership to submit a monthly summary report to the pharmaceutical company sponsor of each participating PAP, “providing detailed information about the PAP drugs dispensed to eligible patients during the previous month.”¹¹³

The OIG concluded that the arrangement could potentially violate both the anti-kickback statute and the prohibition on inducements to Medicare beneficiaries contained in the civil monetary penalties, but nevertheless, OIG approved the arrangement due to several safeguards.¹¹⁴ Specifically, OIG identified the following safeguards: (1) the inventory segregation of the free drugs to be provided protected against free clinics and FQHCs from receiving any remuneration such as excess stock that could be diverted to other uses;¹¹⁵ (2) the arrangement was documented in detail and was auditable, which assured transparency;¹¹⁶ (3) the PAP sponsors did not control the selection of the free clinics or the FQHCs which prevented PAP sponsors from “cherry-picking” certain FQHCs to receive donated drugs;¹¹⁷ (4) the physicians who prescribed drugs for FQHC patients did “not receive any compensation that [would] take[] into account in any manner the physicians’ prescribing patterns for PAP sponsors’ products, and the FQHCs [did] not track any physician’s prescribing patterns of PAP drugs”;¹¹⁸ and (5) in its liaison capacity, the Partnership insulated the FQHCs from PAP sponsors.¹¹⁹

2. *Advisory Opinions 07-21, 07-22, 08-09, & 08-21: The Gainsharing Exception.*—In 2008, OIG issued four separate Advisory Opinions addressing several proposed arrangements involving gainsharing agreements.

a. *Advisory opinions 07-21 & 07-22.*—On December 29, 2007, the U.S. Department of Health and Human Services issued Advisory Opinions 07-21¹²⁰

110. *Id.* at 2-3.

111. *Id.* at 3-4.

112. *Id.* at 3.

113. *Id.*

114. *Id.* at 12.

115. *Id.* at 10.

116. *Id.*

117. *Id.* at 10-11.

118. *Id.* at 10.

119. *Id.* at 11.

120. OIG Advisory Opinion No. 07-21 (Dec. 28, 2007), *available at* <http://www.oig.hhs.gov/>

and 07-22,¹²¹ in which the OIG restated its position regarding gainsharing arrangements with respect to surgeons and anesthesiologists.¹²² In both arrangements, the hospitals engaged a third-party program administrator (Administrator) to collect and analyze data related to the proposed cost saving practices, and to manage the arrangement.¹²³ Both Administrators identified a number of specific cost-saving opportunities such as: (1) use as needed items; (2) product substitution; and (3) product standardization.¹²⁴

The OIG noted its overall concerns related to gainsharing arrangements, included: (1) “stinting on patient care”; (2) “cherry picking” healthy patients; (3) payments in exchange for referrals; and (4) unfair competition.¹²⁵

The OIG determined that both arrangements contained a variety of safeguards so as to protect against inappropriate reductions in services, including: (1) “the specific cost-saving actions and resulting savings were clearly and separately identified”; (2) the hospitals provided “credible medical support for the position that implementation of the recommendations did not adversely affect patient care”; (3) the Administrator used “objective historical data and clinical measures”; and (4) the product standardization ensures “that individual physicians still had available the same selection of devices and supplies under the [a]rrangement as before.”¹²⁶ Thus, the OIG concluded that neither arrangement violated the civil monetary penalties statute.¹²⁷

In addition, the OIG analyzed these arrangements under the anti-kickback statute. In that analysis, the OIG determined that the personal services safe harbor would not afford protection to the arrangements because the aggregate compensation was not set forth in advance.¹²⁸ Nevertheless, the OIG determined that it would not impose sanctions because: (1) the circumstances and safeguards reduced the likelihood that the arrangements would attract or increase referrals; (2) each group was the sole participant of their respective arrangement and each group was composed of their respective specialty; and (3) the activities required

fraud/docs/advisoryopinions/2007/AdvOpn07-21A.pdf.

121. OIG Advisory Opinion No. 07-22 (Dec. 28, 2007), *available at* <http://www.oig.hhs.gov/fraud/docs/advisoryopinions/2007/AdvOpn07-22A.pdf>.

122. *See* OIG Advisory Opinion No. 07-21, *supra* note 119, at 11; OIG Advisory Opinion No. 07-22, *supra* note 120, at 11.

123. OIG Advisory Opinion No. 07-21, *supra* note 119, at 2-3; OIG Advisory Opinion No. 07-22, *supra* note 120, at 2-3.

124. OIG Advisory Opinion No. 07-21, *supra* note 119, at 4-5; OIG Advisory Opinion No. 07-22, *supra* note 120, at 4.

125. OIG Advisory Opinion No. 07-21, *supra* note 119, at 8; OIG Advisory Opinion No. 07-22, *supra* note 120, at 7-8.

126. OIG Advisory Opinion No. 07-21, *supra* note 119, at 10-11; OIG Advisory Opinion No. 07-22, *supra* note 120, at 9-10.

127. OIG Advisory Opinion No. 07-21, *supra* note 119, at 15; OIG Advisory Opinion No. 07-22, *supra* note 120, at 14.

128. OIG Advisory Opinion No. 07-21, *supra* note 119, at 13; OIG Advisory Opinion No. 07-22, *supra* note 120, at 12.

of the groups under the arrangements carried some increased liability risks for physicians, for which compensation was reasonable.¹²⁹ Thus, the arrangements posed a low risk of fraud or abuse under the anti-kickback statute.

b. Advisory opinion 08-09.—On July 31, 2008, the U.S. Department of Health and Human Services, OIG issued Advisory Opinion 08-09, in which the OIG again¹³⁰ discussed its position regarding gainsharing.¹³¹ This time, however, OIG discussed its position with respect to an arrangement under which “a medical center . . . agreed to share with groups of orthopedic surgeons and a group of neurosurgeons a percentage of the medical center’s cost savings arising from the surgeons’ implementation of a number of cost reduction measures in certain surgical procedures.”¹³² Specifically, the medical center would pay the surgeon groups fifty percent of the medical center’s first-year cost savings directly attributable to specific changes in each of the surgeon groups’ operating room practices for spine fusion surgery.¹³³ While the medical center withheld payment under the arrangement until it received a favorable opinion from the OIG, the OIG explicitly stated that such nonpayment does not insulate parties from liability.¹³⁴

The medical center engaged an Administrator to collect and analyze historical data related to the cost-saving practices as well as to manage the arrangement.¹³⁵ The Administrator had thirty-six specific recommendations which can be grouped into two categories: (1) “use as needed biological” and (2) “product standardization.”¹³⁶

The OIG noted that these types of arrangements that share cost savings “could serve legitimate business and medical purposes” if properly structured by increasing “efficiency and reduc[ing] waste, thereby potentially increasing a hospital’s profitability.”¹³⁷ However, the OIG reiterated its longstanding concerns related to gainsharing arrangements as aforementioned.¹³⁸

129. OIG Advisory Opinion No. 07-21, *supra* note 119, at 13-14; OIG Advisory Opinion No. 07-22, *supra* note 120, at 13-14.

130. *See also* OIG Advisory Opinion No. 08-21 (Nov. 25, 2008), *available at* <http://www.oig.hhs.gov/fraud/docs/advisoryopinions/2008/AdvOpn08-21.2.pdf>. The OIG utilizing similar analysis reiterates its positions regarding gainsharing in the context of cardiac catheterization procedures. *Id.* at 12. Consistent with its prior gainsharing advisory opinions, the OIG found that the arrangement implicated both the civil monetary penalties statute and the anti-kickback statute. *Id.* at 16. However, the OIG concluded that it would not impose sanctions due to the presence of certain program safeguards. *Id.*

131. *Id.* at 3 n.4.

132. *Id.* at 1.

133. *Id.* at 5.

134. OIG Advisory Opinion No. 08-09 (July 31, 2008), *available at* <http://www.oig.hhs.gov/fraud/docs/advisoryopinions/2008/AdvOpn08-09B.pdf>.

135. *Id.* at 3.

136. *Id.* at 4.

137. *Id.* at 7.

138. *Id.* at 11.

The OIG ultimately concluded that the arrangement provided sufficient safeguards such as (1) the transparency of the identifiable cost-saving actions, (2) credible support that patient care was unaffected, and (3) the medical center and surgeons provided written disclosures of the arrangement to patients, which precluded the OIG from seeking sanctions.¹³⁹

Additionally, the OIG analyzed the arrangement under the anti-kickback statute and determined that the personal services safe harbor would not protect the arrangement because the compensation was not set forth in advance.¹⁴⁰ However, the OIG consistently concluded that sanctions would not be imposed because of several safeguards including (1) the low likelihood that referrals would increase as a result of the arrangement, (2) the low likelihood that the arrangement would influence other physicians who refer patients to the surgeon groups, and (3) the increased liability risks for the surgeons.¹⁴¹ The OIG continued to emphasize the transparency of this gainsharing arrangement, but still cautioned against similar arrangements, including multi-year arrangements or those based on generalized, less specific cost savings formulae.¹⁴²

III. TAX

In 2007 and 2008, there were several tax developments that directly impacted the health care industry. These developments include the introduction of the new Form 990 by the Internal Revenue Service, final regulations relating to the requirements for tax exemption status under 501(c)(3) of the Internal Revenue Code, and an Interim Report on the Hospital Compliance Project. Below is a brief summary and analysis each of these recent tax developments.

A. *Final Form 990*

Since the summer of 2007, the world of tax exempt organizations, including tax exempt hospitals, has been intently focused on the changes associated with the redesign of the Form 990, *Return of Organizations Exempt from Income Tax*, by the Internal Revenue Service (IRS). After the closing of comment periods to drafts of the Form 990 and related instructions, the final version of the redesigned Form 990 (New Form 990) was released on December 20, 2007,¹⁴³ and instructions to the New Form 990 were released on August 19, 2008 (Instructions).¹⁴⁴

The New Form 990 represents one of the most significant changes in the tax exempt sector during the last thirty years. “The focus of the redesign . . . was on

139. *Id.* at 9-11.

140. *Id.* at 12.

141. *Id.* at 12-13.

142. *Id.* at 12.

143. I.R.S. News Release IR-2007-204 (Dec. 20, 2007).

144. I.R.S. News Release IR-2008-98 (Aug. 19, 2008); *see also* I.R.S., Chronological History: Redesign of the 2008 Form 990 and Corresponding Instructions (June 18, 2009), *available at* <http://www.irs.gov/charities/charitable/article/0,,id=185892,00.html>.

increasing reporting related to governance, executive compensation, related organizations, fundraising practices, and hospitals' amount of community benefit," according to Lois Lerner, IRS Exempt Organizations Division Director.¹⁴⁵ The subject matter that is addressed in the New Form 990 was developed based on a perceived need to aid the tax compliance interests of the IRS as well as the transparency and accountability needs of the states, the general public, and local communities served by tax exempt organizations.¹⁴⁶ The New Form 990 becomes applicable for tax years beginning in 2008 (i.e., returns filed in 2009). The effective date for the filing of certain information on Schedule H (Hospitals) and Schedule K (Bonds) has been delayed for one year.¹⁴⁷ Only the portions of these Schedules that provide certain identifying information must be completed for the 2008 tax year.¹⁴⁸

The implementation of the New Form 990 represents an increased compliance burden for most tax-exempt organizations, especially tax exempt hospitals. The New Form 990 will require the disclosure of a significant amount of new information, which will be available publically.¹⁴⁹ The New Form 990 consists of a core form (Core Form) and sixteen schedules (each referred to as a Schedule) that cover various topics.¹⁵⁰ Every organization that files the New Form 990 will complete the Core Form.¹⁵¹ Completion of the Schedules will be dependent upon the type of activities that the organization conducts.¹⁵² While much has changed with the New Form 990, three areas should be of particular interest to tax exempt hospitals: governance, compensation, and hospital activities, including community benefit and charity care activities that must be reported on Schedule H.¹⁵³

With respect to governance, a section of the Core Form is primarily devoted to questions about the governance of the organization that will likely influence the behavior of most tax-exempt organizations.¹⁵⁴ The questions require only a "yes" or "no" answer, but in effect, these questions encourage organizations to revisit their structural and policy choices and modify their conduct.¹⁵⁵ The

145. Christopher Quay & Fred Stokeld, IRS's Lerner Details Draft of Redesigned Form 990, 57 EXEMPT ORG. TAX REV. 9 (2007).

146. IRS Frequently Asked Questions, Why Did the IRS Redesign the Form? (Jan. 7, 2007), available at <http://www.irs.gov/charities/article/0,,id=176670,00.html>.

147. See TY 2008 Form 990—Forms and Instructions, Instructions for Schedule H and Instructions for Schedule K (Jan. 5, 2009), available at <http://www.irs.gov/charities/article/0,,id=185561,00.html>.

148. *Id.*

149. See 26 U.S.C. § 6104(d)(1) (2006).

150. I.R.S. News Release IR-2007-204 (Dec. 20, 2007).

151. *Id.*

152. *Id.*

153. See *id.*

154. See Instructions for Form 990, at 15-19, available at <http://www.irs.gov/pub/irs-pdf/990.pdf>.

155. See generally *id.*

policies addressed include a conflict of interest policy, a whistleblower policy, and a document retention policy.¹⁵⁶ This portion of the form also inquires as to whether the organization's process for approving compensation arrangements satisfies the requirements for the rebuttable presumption of reasonableness.¹⁵⁷

Significant with respect to the conflict of interest policy is the detail sought on conflicts enforcement practices, whether discovered before or after the transaction has occurred. This includes a description of the types of persons covered by the policy, the level at which the conflicts determination is made and at which actual conflicts are reviewed, as well as any restrictions imposed upon a person determined to have a conflict with respect to a particular transaction.¹⁵⁸ While the IRS believes that the listed policies and procedures generally improve tax compliance, it noted that many of the policies or procedures are not legally required.¹⁵⁹ If an organization does not already have the right policies or procedures in place with respect to these items (or similar ones discussed elsewhere on the New Form 990), then it may be prudent to adopt such policies.

An organization also must disclose how it makes certain information about itself—including its Form 1023, Form 990, governing documents, and various other information—available to the public.¹⁶⁰ Once again, the IRS is signaling that such information should be readily accessible and is inviting organizations to take action voluntarily rather than have the IRS compel them to do so.

Compensation is addressed in two areas of the New Form 990—in Part VII of the Core Form and in Schedule J, Compensation. In Part VII, organizations must report compensation for (1) current officers, directors, trustees, and key employees; (2) the five highest paid employees earning over \$100,000; (3) former officers, key employees, and the five highest paid employees (going back five years) earning over \$100,000; and (4) former directors or trustees who received more than \$10,000 of reportable compensation.¹⁶¹ A separate table demands compensation information for the highest-paid independent contractors.¹⁶²

In Schedule J, compensation information must be supplied for (1) any person listed in Part VII who receives reportable compensation greater than \$150,000 from the organization and any related organizations; (2) any former officer, key employee, or highest compensated employee receiving reportable compensation of \$100,000 or more; (3) any former director or trustee receiving reportable compensation greater than \$10,000; and (4) any individual who receives compensation from any source, other than the organization, for services rendered

156. *See id.*; *see also* 2008 Form 990: Return of Organization Exempt from Income Tax, OMB No. 1545-0047, at 6, ll. 13-14, available at <http://www.irs.gov/pub/irs-pdf/f990.pdf> [hereinafter 2008 Form 990] (providing disclosures on Part VI of the return).

157. 2008 Form 990, *supra* note 155, at 6, l. 15.

158. *Id.* at 6, l. 12.

159. Instructions for Form 990, *supra* note 153, at 15.

160. 2008 Form 990, *supra* note 155, at 6, l. 19.

161. *Id.* at 7, l. 1a (listing the disclosures required under Part II).

162. *Id.* at 8, § B, l. 1-2.

to the organization.¹⁶³ Schedule J also requires disclosures regarding specific types of compensation, some of which (e.g., first class travel or health club dues) the IRS has identified as occasionally problematic.¹⁶⁴ An organization must provide details about the process for setting the compensation of the chief executive officer and, in some cases, other officers.¹⁶⁵ Finally, Schedule J requires information about deferred compensation and nontaxable fringe benefits.¹⁶⁶

Schedule J, in combination with Part VII of the Core Form, will require disclosure of a great deal of information not previously collected by the IRS. There is no transition relief concerning this Schedule, so organizations should already have systems in place to identify the various highly compensated individuals and to track and record the benefits they provide to them.

Schedule H, Hospitals, should be of great interest to tax exempt hospitals even though the substantive questions on this schedule are optional for the 2008 tax year,¹⁶⁷ because it represents an entirely new compliance component for tax exempt hospitals. Schedule H must be completed by a filing organization that operates one or more hospitals.¹⁶⁸ The Instructions provide that the term "hospital" is limited to state-licensed hospitals.¹⁶⁹ In the New Form 990, Schedule H is divided into the following six parts: Part I—Charity Care and Certain Other Community Benefits at Cost; Part II—Community Building Activities; Part III—Bad Debt, Medicare & Collection Practices; Part IV—Management Companies and Joint Ventures; Part V—Facility Information; and Part VI—Supplemental Information.¹⁷⁰

Part I of Schedule H requests information regarding charity care and certain other community benefits provided by the organization.¹⁷¹ Part I raises numerous questions regarding the charitable care that the organization provides.¹⁷² The Schedule utilizes the community benefit reporting model advanced by Catholic Healthcare Association. Part I of Schedule H requires each line item of charity care/community benefit to include information regarding the number of the organization's charitable activities or programs related to that benefit, persons

163. See 2008 Form 990, Schedule J: Compensation Information, available at <http://www.irs.gov/pub/irs-pdf/f990sj.pdf>.

164. See *id.*

165. *Id.*

166. *Id.*

167. See 2008 Form 990: Instructions for Schedule H, at 1, available at <http://www.irs.gov/pub/irs-pdf/i990sh.pdf>. Only one part of the form that identifies hospital facilities will need to be completed when organizations file their returns in 2009. *Id.* (noting that only Part V must be completed).

168. See *id.*

169. *Id.* at 1.

170. *Id.* at 2-7.

171. See *id.* at 2.

172. See 2008 Form 990, Schedule H: Hospitals, available at <http://www.irs.gov/pub/irs-pdf/f990sh.pdf> [hereinafter 2008 Form 990, Schedule H].

served, total community benefit expense, direct offsetting revenue, net community benefit expense, and the percent of total expenses represented by such benefit.¹⁷³ The IRS has decided with the New Form 990 that Medicare shortfalls and bad debt should not be included in the calculation of community benefit—although such matters still may be reported in another area of the form.¹⁷⁴ According to the instructions to Part I, a hospital is required to use the “most accurate costing methodology” in reporting various costs on Schedule H.¹⁷⁵

Part II of Schedule H, allows an organization to describe its community building activities.¹⁷⁶ Examples of such activities include physical improvements and housing, economic development, community support, and environmental improvements.¹⁷⁷ Part III allows an organization to provide information about its bad debt and Medicare shortfalls.¹⁷⁸ The schedule also seeks information regarding collection practices.¹⁷⁹ Part IV of Schedule H requires that an organization identify and describe all management companies and joint ventures (regardless of their tax structure as partnerships or corporations) which it owns together with any of its officers, directors, trustees, key employees, or physicians.¹⁸⁰ In Part V of Schedule H, the IRS requests general information regarding the different facilities at which the organization provides medical or hospital care, including the activities and programs conducted at each such facility.¹⁸¹ This is the only Part of this Schedule that organizations will be required to complete for 2008.¹⁸² Part VI of Schedule H seeks certain supplemental information regarding the organization, such as how the organization assesses the health care needs of the communities it serves and how the organization informs and educates patients about their eligibility for assistance under federal, state, or local government programs or under the organization’s charity care policy.¹⁸³ Part VI also seeks any other information important to describing how the organization’s hospital facilities further its exempt purposes.¹⁸⁴

Schedule H demands more information from hospitals than ever before, and it is probable that reform advocates, members of Congress, and others will point to such information to support proposed changes to the tax-exempt healthcare sector. Overall, the New Form 990 presents a much more logical and systematic approach to the information reporting for tax exempt organizations. However,

173. See 2008 Form 990, Schedule H, *supra* note 171, at 1.

174. 2008 Form 990: Instructions for Schedule H, *supra* note 166, at 2.

175. *Id.* at 3.

176. *Id.*

177. See *id.* at 3-4.

178. *Id.* at 4.

179. *Id.* at 5 (discussing Section C of Part III).

180. *Id.* at 5-6.

181. See *id.* at 6.

182. *Id.* at 1, 6.

183. *Id.* at 6-7.

184. *Id.* at 7 (discussing line 7).

the volume of new information that must be produced by tax exempt organizations will undoubtedly be burdensome. Most significantly, tax exempt hospitals will need to evaluate their policies and operations to ensure that they can provide information on the New Form 990 that represents them in a favorable light.

*B. Interaction Between Tax Exempt Status and Rules Regarding
Excess Benefit Transactions*

On March 28, 2008, the IRS released final regulations that clarify the substantive requirements for tax exemption under section 501(c)(3) of the Internal Revenue Code of 1986, as amended (Code), explain the relationship between those requirements and the imposition of excise taxes under Code section 4958, better known as the Intermediate Sanctions Law, and provide several examples of the interaction between Code sections 501(c)(3) and 4958.¹⁸⁵

For background purposes, the Intermediate Sanctions Law imposes excise taxes on “excess benefit transactions.”¹⁸⁶ An excess benefit transaction occurs when a tax exempt organization provides a benefit to a “disqualified person” that exceeds the fair market value of the consideration received for such benefit.¹⁸⁷ A disqualified person is “any person who was, at any time during the [five-year] period ending on the date of such transaction, in a position to exercise substantial influence over the affairs of the [tax exempt] organization,” any close family member of such individual, and any entity in which any such individual owns more than a thirty-five percent interest.¹⁸⁸

The IRS had previously issued proposed regulations addressing this topic on September 9, 2005.¹⁸⁹ The release of these regulations finalize the IRS’s application of certain factors when determining whether an exempt 501(c)(3) organization that has engaged in an excess benefit transaction should also lose its exempt status.¹⁹⁰ Specifically, the IRS will consider the following facts and circumstances:

(A) the size and scope of the [exempt] organization’s regular and ongoing activities that further exempt purposes before and after the excess benefit transaction or transactions occurred;

(B) the size and scope of the excess benefit transaction or transactions (collectively, if more than one) in relation to the size and scope of the [exempt] organization’s regular and ongoing activities that further exempt purposes;

185. See Treas. Reg. §§ 1.501(c)(3)-1, 53.4958-2 (as amended by T.D. 9390, 2008-18 I.R.B. 855).

186. See 26 U.S.C. § 4958(c) (2006).

187. *Id.* § 4958(c)(1).

188. *Id.* § 4958(f)(1).

189. See T.D. 9390, 2008-18 I.R.B. 855 (2008).

190. *Id.*

(C) whether the [exempt] organization has been involved in multiple excess benefit transactions with one or more person;

(D) whether the [exempt] organization has implemented safeguards that are reasonably calculated to prevent excess benefit transactions; and

(E) whether the excess benefit transaction has been corrected . . . or the [exempt] organization has made good faith efforts to seek correction from the disqualified person(s) who benefited from the excess benefit transaction.¹⁹¹

All of the foregoing factors will be “considered in combination with each other,” and the IRS “may assign greater or less weight to some factors than to others.”¹⁹²

The finalization of these regulations should serve to re-emphasize the importance to tax exempt organizations of having appropriate safeguards against excess benefit transactions and private inurement. Such safeguards should include an effective Intermediate Sanctions Policy to identify and prevent or correct the occurrence of excess benefit transactions.

C. IRS Interim Report on Hospital Compliance Project

On July 19, 2007, the IRS released an Interim Report on Tax Exempt Hospitals and Community Benefit Projects (IRS Interim Report) that summarized the responses from tax exempt hospitals to a questionnaire distributed by the IRS in May 2006.¹⁹³ That questionnaire was sent to over 500 tax exempt hospitals across the country, and it requested information regarding hospitals’ activities, governance, expenditures, and executive compensation practices.¹⁹⁴ The IRS Interim Report presents data gathered from the responses of 487 hospitals and focuses on how those hospitals provide and report benefits to the community pursuant to the community benefit standard.¹⁹⁵

The IRS Interim Report made three basic findings: (1) nearly all hospitals reported providing various types of community benefit; (2) no uniform definition of uncompensated/charity care emerged from various hospital responses; and (3) “there appear to be significant differences in the way other components of community benefit are reported.”¹⁹⁶ In conjunction with the IRS Interim Report, the IRS’s hospital project team recommended developing a separate Form 990 schedule for hospitals as a vehicle for addressing the lack of definitional and

191. Treas. Reg. § 1.501(c)(3)(ii) (as amended by T.D. 9390, 2008-18 I.R.B. 855).

192. *Id.* § 1.503(c)(3)-1(f)(2)(iii).

193. For a copy of the IRS Interim Report, see I.R.S., HOSPITAL COMPLIANCE PROJECT: INTERIM REPORT (Summary of REPORTED DATA) (2008), *available at* http://www.irs.gov/pub/irs-tege/eo_interim_hospital_report_072007.pdf.

194. *See generally id.*

195. *Id.* at 1.

196. I.R.S. News Release IR-2007-132 (July 19, 2007).

reporting uniformity.¹⁹⁷ The IRS responded with the new Schedule H, Hospitals, as part of the New Form 990, which was clearly influenced by the preliminary results of the IRS Interim Report.

The IRS issued a final report on the community benefit compliance check in early 2009.¹⁹⁸ The final report is outside the scope of this Survey, but it includes a more in-depth analysis of the responses, including information regarding executive compensation practices, and it provides information based on varying demographics, such as rural and urban communities and hospitals.¹⁹⁹

IV. REIMBURSEMENT & PAYMENT ISSUES

A. *New Provider Reimbursement Review Board Instructions*

On August 8, 2008, the Provider Reimbursement Review Board (Board) provided guidance following the much anticipated changes to the Medicare appeals process by issuing new rules, also referred to as instructions, to comply with new Centers for Medicare and Medicaid (CMS) regulations.²⁰⁰ The instructions outline new requirements under the regulations published by CMS in the *Federal Register* on May 23, 2008.²⁰¹ The new instructions supersede the prior rules and are applicable to all appeals pending as of, or filed on or after, August 21, 2008.²⁰² The Board instructions present additional issues providers must consider when preserving their appeal right before the Board. A brief summary and discussion of the changes to the appeal filing and pre-hearing process affected under the new instructions are discussed below.

1. *Appeal Filing Changes.*—Under the new rules the Board has issued several changes that appear minor in nature but can significantly impact whether the Board will grant jurisdiction to an appeal or whether the Board will consider a document to be timely received. One of the most significant changes was made to the actual Board filing process with respect to date and time of receipt. In order to be deemed timely filed, the previous rules allowed an appeal or document to be accepted by the Board based on the *day of mailing*. Under the new instructions, the filing deadline is now the date of *receipt*.²⁰³ This change

197. *Id.*

198. For a copy of the final report, see I.R.S. IRS EXEMPT ORGANIZATIONS (TE/GE) HOSPITAL COMPLIANCE PROJECT: FINAL REPORT (2009), available at <http://www.irs.gov/pub/irs-tege/frepthosproj.pdf>.

199. *See generally id.*

200. PROVIDER REIMBURSEMENT REVIEW BD., CTRS. FOR MEDICARE & MEDICAID SERVS., PROVIDER REIMBURSEMENT REVIEW BOARD RULES (2008), available at <http://www.cms.hhs.gov/PRRBReview/Downloads/PRRRules2008.pdf>.

201. *See* Provider Reimbursement Determinations and Appeals, 73 Fed. Reg. 30,190 (May 23, 2008) (to be codified at 42 C.F.R. pts. 405, 413, 417). CMS published this Final Rule which outlines the changes to the Provider Reimbursement Review Board appeal process. *Id.*

202. PROVIDER REIMBURSEMENT REVIEW BD., *supra* note 200, at 1.

203. *See* Provider Reimbursement Determinations and Appeals, 73 Fed. Reg. at 30,192 (to be

is significant as it now places a stricter timeline on filing appeals and other time-sensitive documents to the Board. The effects of the changes are as follows. If an over-night carrier is used for delivery, the date of receipt will be the date as recorded by the carrier.²⁰⁴ If the U.S. Postal Service is used for delivery, the date of receipt is the date the Board's receiving entity enters the filing as "received."²⁰⁵

The new rules also place additional limitations on providers with respect to adding new appeal issues to active appeals already timely filed. Under the previous rules, providers had significant leeway to add new appeals issues at any time prior to the Board hearing. The new instructions change this filing deadline dramatically. Now, if a provider wishes to add a new appeal issue, they must do so within sixty days of the initial 180-day filing deadline.²⁰⁶ This change now gives providers a maximum of 240 days to add new issues to individual appeals. The Board's rationale for this change was based on the growing backlog of cases and concern that providers were intentionally leaving appeals open longer with the hope of capturing new appeal issues to add to the original filing.²⁰⁷ The new instructions significantly limit the addition of issues and now require providers to carefully consider the entirety of potential issues that arise from a final determination as part of their filing strategy.

Other appeal filing considerations relate to certain certifications that must be provided to the Board. In the Board instructions, the Board provides several templates that define specific information and specific statements that must be certified to the Board for either an individual provider or group appeal.²⁰⁸ The new instructions require that the designated representative sign a certification to the Board that the issue requested for appeal is not currently under appeal and that there is no common issue related provider (CIRP) issue.²⁰⁹ Under the CIRP rule, if two or more providers have a common appeal issue—are commonly owned or controlled and have the minimum \$50,000 amount in controversy requirement—the providers must file their appeal as a CIRP group.²¹⁰ While the

codified at 42 C.F.R. § 405.1801(a), (d)); *see also* PROVIDER REIMBURSEMENT REVIEW BD., *supra* note 200, at 2.

204. Provider Reimbursement Determinations and Appeals, 73 Fed. Reg. at 30,192.

205. *Id.*

206. *Id.* For each fiscal year, providers must submit a cost report to a Medicare Administrative Contractor (formerly referred to as a fiscal intermediary) who is responsible for auditing all costs submitted for payment to CMS. *Id.* at 30,191. After the audit is completed each provider is given a notice of program reimbursement (NPR) by their respective MAC which, among other things, outlines any adjustments to payments—often citing overpayments made to the provider. *See id.* If, after reviewing the NPR and adjustments, the provider wishes to appeal the issue, they have 180 days from the receipt of the NPR from which to initiate the appeal or they generally lose their appeal rights for the cost report year. *See id.* at 30,191, 30,203.

207. *Id.* at 30,192.

208. *See* PROVIDER REIMBURSEMENT REVIEW BD., *supra* note 200, at 45-62.

209. *Id.* at 58.

210. *Id.* at 9. Under the Board instructions, in order to initiate an individual appeal, a provider

CIRP rule has not changed in its scope under the new instructions, the Medicare Administrative Contractors (MAC) (formerly fiscal intermediaries) have noted they intend to deny jurisdiction for an appeal to the Board if the CIRP rule is not followed.

Finally, the Board instructions now require a more comprehensive description of the issue under appeal along with supporting documentation.²¹¹ The Board will no longer accept a general statement of an issue when requesting a hearing. Providers, in their initial hearing request, must provide the following information: (1) proof that all jurisdictional requirements have been met; (2) a thorough explanation of the issue under appeal; (3) the rationale for the appeal and underlying assertion as to why the provider believes the Medicare payment is incorrect—including supporting documentation or the provider's notation of the lack of necessary documentation required to accept the final payment determination; (4) an explanation as to how the determination should be determined differently; and (5) for items properly self-disallowed, a full descriptions of the nature of the controversy, the amount of reimbursement sought, and for cost reporting periods ending on or after December 31, 2008, proof that the self-disallowed item was filed under protest in the provider's cost report.²¹²

2. *Pre-hearing Considerations.*—Under the new instructions, the Board has introduced a significant change with the addition of the Joint Scheduling Order (JSO) which has implications for the appeals pre-hearing procedure.²¹³ In the past, the Board established all preliminary and final position paper due dates in addition to overseeing the pre-hearing process between the provider and MAC based on standard timeframes and the appeal filing date.²¹⁴ The Board is now offering two options for providers with respect to the pre-hearing process: (1) the Board will establish a standard timeline for document filing or (2) the parties may now jointly establish the pre-hearing deadlines in a proposed JSO.²¹⁵ The Board believes the JSO option will promote parties to work together to resolve issues more quickly, allow for stipulations, and promote judicial economy.

The JSO now allows parties to negotiate a detailed pre-hearing timeline setting out agreed upon dates for such important items as the filing of position

must have at least \$10,000 in controversy. *Id.* at 5. For a group appeal, the amount in controversy must be \$50,000. *Id.* at 8.

211. PROVIDER REIMBURSEMENT REVIEW BD., *supra* note 200, at 4.

212. *Id.* at 6, 46-63. A provider may self-disallow an item for payment on their cost report when they believe an item should be reimbursed but also are concerned that by requesting the payment from CMS, they would be in violation of a regulation or other legal authority. *Id.* at 6. If the provider maintains there should be a payment, however, they must file the cost report to CMS under protest. *Id.*; see also 42 C.F.R. § 405.1835(a)(1)(ii) (2006) (outlining the filing of a cost report under protest).

213. PROVIDER REIMBURSEMENT REVIEW BD., *supra* note 200, at 17-20; see also 42 C.F.R. § 405.1853 (2006).

214. PROVIDER REIMBURSEMENT BD., *supra* note 200, at 17.

215. *Id.*

papers and the exchange of information.²¹⁶ Under the JSO, the Board will still maintain authority over setting the final position paper due dates and scheduling the date of the hearing.²¹⁷ As part of the JSO request, the parties must identify all issues they agree to, conditionally agree to, and any issues that remain in dispute.²¹⁸ Providers must also provide the Board with expected discovery requests and a timeline for the exchange of information.²¹⁹ When approved, the JSO becomes the timeline that the Board will follow with respect to the pre-hearing procedure. If a provider or MAC fails to follow the negotiated JSO, they jeopardize their appeal rights before the Board.

B. Recovery Audit Contractors

The Recovery Audit Contractor (RAC) Program was instituted by CMS under authorization from the Medicare Modernization Act of 2003²²⁰ and was made permanent under the Tax Relief and Health Care Act of 2006.²²¹ Recovery Audit Contractors are independent organizations that contract with the federal government to audit improper over- and under-payments made to providers through the Medicare program.²²² Congress implemented the RAC Program as a means to support CMS in its efforts to prevent improper payments and safeguard against increased costs.²²³ In 2007, OMB estimated that, of the 1.2 billion claims processed by CMS for that year, improper payments accounted for Medicare costs of \$10.8 billion.²²⁴ The program was initiated under a three-year demonstration project beginning in 2005 that was first piloted in California, New York, and Florida and was eventually implemented in Arizona, Massachusetts, and South Carolina.²²⁵ An overview of the RAC Demonstration Project and implications for the final RAC Program is discussed below.

1. *RAC Demonstration Project, 2005-2008.*—The RAC Demonstration Project began in 2005 and ended on March 27, 2008.²²⁶ The Program was specifically designed to identify and correct past improper CMS payments and provide information to CMS regarding claims error rates that could be used to

216. *Id.* at 17-20.

217. *Id.* at 20.

218. *Id.* at 19-20.

219. *Id.* at 19.

220. Medicare Prescription Drug, Improvement, and Modernization Act of 2003, Pub. L. No. 108-173, § 306, 117 Stat. 2066, 2256-57.

221. Tax Relief and Health Care Act of 2006 § 302, 42 U.S.C. § 1395ddd (2006).

222. *See id.*

223. *See id.* § 1395ddd(a).

224. CTRS. FOR MEDICARE AND MEDICAID, THE MEDICARE RECOVERY AUDIT CONTRACTOR (RAC) PROGRAM: AN EVALUATION OF THE 3-YEAR DEMONSTRATION 1 (2008), *available at* <http://www.cms.hhs.gov/RAC/Downloads/RAC%20Evaluation%20Report.pdf> [hereinafter RAC PROGRAM].

225. *Id.*

226. *Id.* at 6.

prevent future improper payments.²²⁷ Through a competitive bidding process, three contractors were invited to participate in the RAC Demonstration Project and were divided among the piloted states.²²⁸ The RACs were paid by what has proven to be a controversial method of payment. While most agencies working with CMS are paid through appropriated funds, RACs were paid based on a contingency fee.²²⁹ That is, they were paid a percentage based on the number of improper claims the RACs identified and collected.

Results of the RAC Demonstration paint an interesting picture of what will likely occur once the RAC Program is implemented nationally in 2010.²³⁰ Upon completion of the demonstration on March 27, 2008, the RAC auditors had identified over \$1.03 billion in improper payments—ninety-six percent (\$992.7 million) were recovered overpayments made to providers while only four percent (\$37.8 million) were repaid to providers for underpayment.²³¹ With respect to hospital claims, critical areas that were examined included medical necessity and documentation related to proper coding.²³² Of the hospital overpayment claims reviewed, forty-one percent of all improper claims were due to a medically unnecessary setting, thirty-six percent were due to incorrectly coded claims, and eight percent were due to insufficient documentation.²³³

After the RAC Demonstration project was completed, CMS implemented new guidelines that will become effective with the final program.²³⁴ Key changes include: (1) RACs can only review claims going back to October 1, 2007; (2) all RACs must have a medical director; (3) RACs must have all issues they intend to examine approved by CMS and then must comply with the standards set forth by CMS; (4) RACs must post the issues on their website for providers to review; (5) RACs will only be able to request medical records based on a provider's NPI number for inpatient hospitals the RACs can only obtain ten percent of average monthly Medicare claims (maximum of 200 records) every forty-five days; and (6) RACs cannot review any claim or issue now under investigation or previously reviewed by the OIG.²³⁵

2. *The Implications of the Permanent RAC Program.*—After the RAC

227. *Id.* at 11.

228. *Id.* During the RAC Demonstration, Connolly was the RAC for New York and Massachusetts, HealthDataInsights was the RAC for Florida and South Carolina and PRG-Schultz was the RAC for California and Arizona. *Id.*

229. *Id.*

230. The national implementation is contemplated by the Medicare Modernization Act of 2003. *See* Medicare Prescription Drug, Improvement, and Modernization Act of 2003, Pub. L. No. 108-173, § 306, 117 Stat. 2066, 2256-57.

231. RAC PROGRAM, *supra* note 227, at 2.

232. *Id.* at 56, app. E.

233. *Id.* at 18-19.

234. *See id.* at 25, tbl. 10.

235. *Id.*; *see also* CTRS. FOR MEDICARE AND MEDICAID, RAC MEDICAL RECORD REQUEST LIMITS (2009), available at <http://www.cms.hhs.gov/RAC/Downloads/RAC%20Medical%20Record%20Request%20Limits.pdf>.

Program was halted due to a bidding dispute in November 2008, CMS announced on February 6, 2009, that the final RAC contractors were named.²³⁶ Under the permanent RAC Program the country has been divided into four regions.²³⁷ The following RACs will be paid and are as follows: (1) in Region A, Diversified Collection Services will be the RAC and will be paid a contingency fee of 12.45%; (2) in Region B, CGI Technologies and Solutions will be the RAC and will be paid a fee of 12.50%; (3) in Region C, Connolly Consulting Associates will be the RAC and will be paid a fee of 9.00%; and (4) in Region D HealthDataInsights will be the RAC and will be paid 9.49%.²³⁸ The permanent RAC Program began in March 2009 in some areas of the country and will be nationally ramped up through 2010.

Hospitals and providers throughout the country are in various stages of trying to become RAC-ready. Hospitals have been encouraged to develop a centralized, multi-disciplinary group of healthcare providers and staff who can quickly respond to a RAC inquiry.²³⁹ Although providers in demonstration states have provided insight into how to prepare for a RAC data request, the demonstration project made it clear that providers should understand their rights and obligations and how to properly and quickly respond to a RAC inquiry.²⁴⁰ To begin, providers should know that RACs audit payment claims by one of two methods: (1) by mining claims data provided by to them by CMS and/or (2) by reviewing a sampling of patient charts delivered by the providers to the RAC upon request. If a provider receives a records request, hospitals have forty-five days to respond.²⁴¹ Hospitals can request an extension, but must do so before day forty-five.²⁴² Providers who fail to respond in a timely manner will have their claims denied. RACs have sixty days to review records and within the sixty day period must notify providers of the final determination by letter.

Preserving appeal rights as the result of the RAC audit is another important

236. See Andrea Kraynak, *RAC Protest Resolved: CMS to Continue RAC Program Implementation*, HEALTHLEADERSMEDIA.COM, Feb. 9, 2009, n.p., http://www.healthleadersmedia.com/content/227913/topic/WS_HLM2_FIN/RAC-Protest-Resolved-CMS-to-Continue-RAC-Program-Implementation.html.

237. For a map of these jurisdictions, see Ctrs. for Medicare and Medicaid Servs., Proposed 2008 RAC Jurisdictions, <http://www.cms.hhs.gov/RAC/Downloads/Four%20RAC%20Jurisdictions.pdf> (last visited July 6, 2009).

238. FedBizOpps.Gov, Recovery Audit Contractor (RAC), https://www.fbo.gov/index?s=opportunity&mode=form&id=5c8c7d4b00249ba579d4d77d64bd0aea&tab=core&_cview=1&ck=1&au=&ck= (last visited July 6, 2009).

239. See, e.g., Bill Phillips et al., *10 Critical Actions to Minimize RAC Recoupment*, HEALTHLEADERS MEDIA.COM, Feb. 23, 2009, n.p., http://www.healthleadersmedia.com/content/228655/topic/WS_HLM2_FIN/10-Critical-Actions-to-Minimize-RAC-Recoupment.html.

240. See RAC PROGRAM, *supra* note 227, at 29.

241. Ctrs. for Medicare and Medicaid Servs., Frequently Asked Questions, “How Long Does a Provider Have to Submit Medical Records When Requested by a Recovery Audit Contractor (RAC)?,” <http://questions.cms.hhs.gov/> (search for question number 7725).

242. *Id.*

consideration. If hospitals are engaged in a RAC review, it is crucial to follow an established timeline to help navigate the required procedural obligations. An abbreviated version of the appeals process with important times is outlined below.

- Pre-Appeal: Providers should notify the RAC as soon as it has verified there is a dispute with the RAC's determination of an overpayment issue;
- Level 1 Review: Appeal to the FI/MAC for redetermination, Provider must file within 120 days of receiving the initial RAC determination letter requesting repayment; the MAC/FI has sixty days to issue determination after the request is made;
- Level 2 Review: Provider has 180 days from the FI/MAC redetermination to file an appeal with a Qualified Independent Contractor (QIC); the QIC has sixty days to issue a determination after the request is made;
- Level 3 Review: If denied by the QIC, the provider must file an appeal within sixty days to an Administrative Law Judge (ALJ). The ALJ has ninety days to issue a ruling;
- Level 4 Review: If denied by the ALJ, the provider must appeal within sixty days to the Medicare Appeals Council for review. The Appeals Council has ninety days to issue a determination;
- Level 5 Review: If denied by the Appeals Council, then the provider must move within sixty days for judicial review in a United States District Court.²⁴³

V. QUALITY

Two extremely important developments which relate to quality of health care include the new Red Flag Regulations as well as a final rule regarding the recognition of new Hospital Acquired Conditions. These developments require providers to be more diligent in the way they deliver care.

A. Red Flag Regulations

On December 4, 2003, President Bush signed the Fair and Accurate Credit Transactions Act (FACTA).²⁴⁴ FACTA was originally enacted to provide greater protection against consumer identity theft and directed six federal agencies to develop methods of detecting consumer identity theft.²⁴⁵ These six agencies

243. See Ctrs. for Medicare and Medicaid Servs., Original Medicare (Parts A and B Fee-For-Service) Appeals Process, <http://www.cms.hhs.gov/OrgMedFFSAppeals/Downloads/AppealsprocessflowchartAB.pdf> (last visited July 6, 2009).

244. See Fair and Accurate Credit Transactions Act of 2003, Pub. L. No. 108-159, 117 Stat. 1952, 2012.

245. See 15 U.S.C. § 1681m(e)(1)(A) & (2)(A) (2006). The six agencies Congress directed to develop guidelines were: (1) the Office of the Comptroller of the Currency, Treasury; (2) the Board of Governors of the Federal Reserve System; (3) the Federal Deposit Insurance Corporation; (4) the Office of Thrift Supervision, Treasury; (5) the National Credit Union Administration; and (6) the Federal Trade Commission. *Id.* § 1681m(2)(1) (listing the first three under the general

jointly promulgated final regulations that were initially to become effective November 1, 2008, but were later delayed and are presently effective as of May 1, 2009 (Red Flag Rules).²⁴⁶ The Red Flag Rules impose obligations on many health care providers to establish programs and greater oversight to prevent consumer identity theft.

The Red Flag Rules require “each financial institution or creditor to develop and implement a written Identity Theft Prevention Program (Program) to detect, prevent, and mitigate identity theft in connection with the opening of certain accounts or certain existing accounts.”²⁴⁷ The Rules define Red Flags as “a pattern, practice, or specific activity that indicates the possible existence of identify theft,” which the aforementioned program should protect against.²⁴⁸ They also provide guidelines “to assist financial institutions and creditors in the formulation and maintenance of [such] a Program that satisfies the requirements of the [rules].”²⁴⁹ Key definitions of the Red Flag Rules bring some health care entities within the rules’ purview. The Rules define “creditor” as “any [entity] who regularly extends, renews, or continues credits; any [entity] who regularly arranges for the extension, renewal, or continuation of credit; or any assignee of an original creditor who participates in the decision to extend, renew, or continue credit.”²⁵⁰ “Credit” is defined as “the right granted by a creditor to a debtor to defer payment of debt or to incur debts and defer its payment or to purchase property or services and defer payment therefore.”²⁵¹ Finally, “covered account” is defined as:

(i) An account that a financial institution or creditor offers or maintains, primarily for personal, family, or household purposes, that involves or is designed to permit multiple payments or transactions, such as a credit card account, mortgage loan, automobile loan, margin account, cell phone account, utility account, checking account, or savings account; and

(ii) Any other account that the financial institution or creditor offers or maintains for which there is a reasonably foreseeable risk to customers or to the safety and soundness of the financial institution or creditor from identity theft, including financial, operational, compliance, reputation, or litigation risks.²⁵²

heading of “Federal banking agencies”).

246. FED. TRADE COMM’N, FTC ENFORCEMENT POLICY: IDENTITY THEFT RED FLAGS RULE, 16 CFR 681.2 (2008), *available at* <http://www.ftc.gov/os/2008/10/081022idtheftredflagsrule.pdf>.

247. Identity Theft Red Flags and Address Discrepancies Under the Fair and Accurate Credit Transactions Act of 2003, 72 Fed. Reg. 63,718, 63,718 (Nov. 9, 2007).

248. 16 C.F.R. § 681.1(b)(9) (2009).

249. *Id.* pt. 681, app. A.

250. *Id.* § 681.1(b)(5) (citing 15 U.S.C. § 1681a(r)(5) (2006)).

251. *Id.* § 681.1(b)(4) (citing 15 U.S.C. § 1681a(r)(5) (2006)).

252. *Id.* § 681.1(b)(3).

In context, the definition of covered account implies a continuing relationship where a consumer receives a service or product that is billed retroactively. The widespread practice among health care institutions to bill for services after those services have been provided and the maintenance of accounts that allow for patients to defer and make multiple payments for these services will likely allow the FTC to characterize health care institutions who maintain these practices as “creditors” who extend “credit” under the Red Flag Rules. Moreover, the FTC may characterize patient accounts as “covered accounts,” as patient accounts are generally accounts maintained for personal and/or family purposes (e.g., health care needs) that are designed to allow multiple payments. Such characterizations will likely trigger the application of the Red Flag Rules to these health care institutions. Moreover, while there has been some speculation as to whether the FTC has jurisdiction over non-profit entities, including nonprofit hospitals, the FTC has taken the position that it will enforce the Red Flag Rules against nonprofit entities.²⁵³

Health care entities that determine they are covered by the Rules, finding they (1) are creditors and (2) have covered accounts, must follow the Red Flag Rules by implementing a Program. Each entity must tailor its Program to protect against the risk of identity theft based on its own operations and circumstances.²⁵⁴ For example, health care institutions covered by the rules would likely develop a Program to address medical identity theft.²⁵⁵ However, each Program must contain reasonable policies and procedures to:

- (i) Identify relevant Red Flags for covered accounts that the . . . [c]reditor officer or maintains, and incorporate those Red Flags into its Program;
- (ii) Detect Red Flags that have been incorporated into the Program of . . . the [c]reditor;
- (iii) Respond appropriately to any Red Flags that are detected . . . to prevent and mitigate identity theft; and
- (iv) Ensure the Program (including the Red Flags determined to be relevant) is updated periodically, to reflect changes in risks to customers and to the safety and soundness of the . . . creditor from identity theft.²⁵⁶

Health care entities implementing an initial Program, addressing all of the

253. Fed. Trade Comm’n, New “Red Flag” Requirements for Financial Institutions and Creditors Will Help Fight Identity Theft (June 2008), *available at* <http://www.ftc.gov/bcp/edu/pubs/business/alerts/alt050.shtm>.

254. 16 C.F.R. § 681.1(d)(1) (2009).

255. Identity Theft Red Flags and Address Discrepancies Under the Fair and Accurate Credit Transactions Act of 2003, 72 Fed. Reg. 63718, 63727 (Nov. 1, 2007).

256. 16 C.F.R. § 681.1(d)(2) (2009).

elements listed above, must receive the approval of the entities' "board of directors or an appropriate committee"; therefore, the Program and the board of directors, committee or "a designated employee at the level of senior management [i.e. compliance officer, risk manager or general counsel]" should be involved "in the oversight, development, implementation and administration of the Program."²⁵⁷ The entities must also train appropriate staff to implement the Program and ensure adequate oversight of its arrangements with service providers.²⁵⁸

The Red Flag Rules Program and oversight requirements will place additional obligations on many health care providers to develop additional policies and procedures to monitor patient accounts for identity theft. Moreover, the rules require more activity, involvement and accountability from governing boards of health care providers in regards to identify theft. Finally, health care providers must monitor their relationships with third parties that provide services to the health care providers and with whom these providers exchange patient account information. Many health care providers may already have in place certain provisions of agreements with third party services providers to protect certain patient information to comply with security and privacy obligations under the Health Insurance Portability and Accountability Act (HIPAA) and regulations that have been promulgated thereto. However, health care providers will have to impose additional oversight mechanisms and impositions on these third party service providers to protect against identity theft as required by the rules.

B. Hospital Acquired Conditions

On August 19, 2008, the Centers for Medicare & Medicaid Services (CMS) issued a final rule regarding additional recognized Hospital Acquired Conditions (HACs) and reportable quality measures.²⁵⁹ The effective date of the final rule is October 1, 2008.²⁶⁰ The final rule implements the HAC payment adjustment provision for all recognized HACs and imposes new reporting requirements for Inpatient Prospective Payment System (IPPS) hospitals who wish to receive the full 2010 payment update.

As part of its continued efforts to promote patient safety and health care quality, as well as support its value-based purchaser model, CMS developed strategies to combat expensive and preventable inpatient complications. In 2005, Congress, in its attempt to reduce the incidence of HACs, authorized CMS to adjust the IPPS to encourage hospitals to prevent medical errors. Legislation required CMS to identify at least two adverse HACs that were: (1) high cost, high volume, or both; (2) assigned to a higher paying diagnosis related group (DRG) when present as a secondary diagnosis; and (3) could reasonably have

257. *Id.* §§ 681.1(e)(1)-(2).

258. *Id.* §§ 681.1(e)(3)-(4).

259. Prospective Payment Systems for Inpatient Hospital Services, 73 Fed. Reg. 48,754 (Aug. 19, 2008) (to be codified at 42 C.F.R. pt. 412)

260. 42 C.F.R. § 412.22(e)(vi) (2008).

been prevented through the application of evidence-based guidelines.²⁶¹

CMS ultimately selected the following HACs for hospitals to report on beginning on October 1, 2007: (1) foreign object retained after surgery; (2) surgical site infection after coronary artery bypass graft surgery; (3) air embolism; (4) blood incompatibility; (5) catheter-associated urinary tract infection; (6) pressure ulcer (stages III and IV); (7) vascular catheter-associated infection; and (8) burns, electric shock, and certain types of falls and traumatic injuries.²⁶²

1. Newly Released HACs and the Payment Adjustment Provision.—Although the proposed rule for the FY 2009 rulemaking period sought comments on numerous HAC candidates, CMS ultimately chose to add two HACs, expand the HAC relating to surgical site infection, and clarify two recognized HACs. Under the final rule, manifestations of poor glycemic control and deep vein thrombosis and pulmonary embolism following total hip or knee replacement were recognized as an HACs.²⁶³ Additionally, the final rule expanded the surgical site infection HAC to include those following certain orthopedic procedures and bariatric surgery for obesity.²⁶⁴ Finally, the final rule refined diagnosis codes to include the payment provision in both the foreign object retention HAC and pressure ulcer HAC.²⁶⁵

The final rule also provided that as of October 1, 2008, any HAC adopted by CMS would only be paid at the higher DRG rate as a secondary diagnosis if it was present on admission.²⁶⁶ This is often referred to by CMS as the HAC payment adjustment provision. This payment adjustment provision allows Medicare to deny payment at the higher DRG rate when a HAC, not present on admission, is later claimed as a secondary diagnosis within the higher paying DRG. As part of this provision, hospitals would be required to report whether the secondary diagnoses were present on admission when submitting their claims.

The payment adjustment provision clearly targets reimbursement by linking payment for health care services to quality of care. Medical record documentation will be invaluable in establishing whether or not a particular condition was present on admission.

2. Expanding Reporting of Hospital Quality Data.—In the final rule, CMS expanded the list of reportable quality measures under the Reporting Hospital Quality Data for Annual Payment Update Program.²⁶⁷ Previously, this program required hospitals to report thirty quality measures on inpatient claims in order

261. Deficit Reduction Act of 2005, S. 1932, 109th Cong. § 5001(c) (2006) (enacted).

262. Medicare Program; Changes to Hospital Inpatient Prospective Payment System and Fiscal Year 2008 Rates, 72 Fed. Reg. 47,130 (Aug. 22, 2007) (to be codified at 42 C.F.R. pt. 411).

263. *Id.* at 47,215.

264. *Id.* at 47,244, 47,261.

265. *Id.* at 48,168.

266. Medicare Program; Changes to the Hospital Inpatient Prospective Payment Systems and Fiscal Year 2009 Rates, 73 Fed. Reg. 48,433, 48,444 (Aug. 19, 2008) (to be codified at 42 C.F.R. pt. 411).

267. *Id.* at 48,617.

to qualify for a full update to their Medicare payment rates. However, in the final rule, CMS added thirteen new reportable measures to this list and retired a pneumonia measure, bringing the total number of reportable quality measures to forty-two. The thirteen new reportable quality measures include: Surgical Care Improvement Project (SCIP) Measure, Readmission Measure, Nursing Sensitive Measure, Agency for Healthcare Research and Quality (AHRQ) Quality Indicators, and Cardiac Surgery Measure.²⁶⁸

According to the final rule, CMS will reduce the Medicare payment update amount by two percent for any hospital that fails to successfully report quality measures.²⁶⁹ In doing so, CMS has once again directed its enforcement at the bottom line. Hospitals who fail to fully comply with this emphasis on quality, efficiency, and transparency will see their reimbursement decline.

HACs are of great concern to both the public and health care providers. The occurrence of these conditions not only decreases the quality of care but also costs federal health care programs billions of dollars each year. Since paying for HACs is inconsistent with Medicare payment reforms, CMS is increasing financial consequences to encourage providers to reduce their occurrence.

VI. CHANGES TO HOSPITAL CONDITIONS OF PARTICIPATION

A. *Hospital Conditions of Participation Interpretive Guidelines*

On April 11, 2008, the CMS issued a Survey & Certification transmittal (S&C)²⁷⁰ to state survey agencies regarding the revised Medicare Conditions of Participation Interpretive Guidelines (Guidelines) for hospitals. The Guidelines serve as the basis for determining hospital compliance, and the S&C provides an advance copy of amendments to, and an accompanying explanation of, Appendix A of the State Operations Manual.²⁷¹

The new Guidelines correspond to the amended Hospital Conditions of Participation (CoPs) published on November 27, 2006. The Guidelines also reflect changes in the regulations from the 2008 Outpatient Prospective Payment System (OPPS), which became effective January 1, 2008. The Guidelines incorporate previously issued CMS guidance into the SOM for Hospitals.

The revised Guidelines reflect CMS' interpretations of the CoPs which address the following areas: history and physicals (H&Ps), post anesthesia evaluations, verbal orders, security of medications, infection control and

268. *Id.* at 48,609.

269. *Id.* at 48,768.

270. DEP'T OF HEALTH & HUMAN SERVS., HOSPITALS—RESTRAINT/SECLUSION INTERPRETIVE GUIDELINES & UPDATED STATE OPERATIONS MANUAL (SOM) APPENDIX A (2008), *available at* <http://www.cms.hhs.gov/SurveyCertificationGenInfo/downloads/SCLetter08-18.pdf> [hereinafter GUIDELINES].

271. DEP'T OF HEALTH & HUMAN SERVS., STATE OPERATIONS MANUAL (2004), *available at* <http://www.cms.hhs.gov/Manuals/IOM/itemdetail.asp?filterType=none&filterByDID=-99&sortByDID=1&sortOrder=ascending&itemID=CMS1201984&intNumPerPage=10>.

communicable diseases, and patient rights. Most noteworthy are CMS' interpretations and examples of restraints and seclusion, training requirements, and death reporting. Also included are many Guidelines on Medicare discharge appeal rights, informed consent, and medication and pharmacy, including medication management and disclosure requirements for physician-owned hospitals. The Guidelines were immediately upon the publication date.

1. *Restraint and/or Seclusion—Sections 482.13(e)-(g).*—The restraint and seclusion section of the Guidelines is quite expansive and provides numerous examples of what CMS deems a restraint or seclusion.²⁷² CMS also provides information about what constitutes a minimal assessment prior to the initiation of a restraint or seclusion of the patient.²⁷³ CMS states that “[t]he decision to use a restraint or seclusion is not driven by diagnosis, but by a comprehensive individual patient assessment.”²⁷⁴ The Guidelines also provide information regarding the hospital's inappropriate use of weapons, the use of drugs or medications which may or may not be a part of the patient's standard medical treatment, and the type of devices or methods used by practitioners that are not considered restraints.²⁷⁵

The Guidelines address significant details regarding the scope of training, who must be trained, and the qualifications of the trainers prior to use of the restraint or seclusion.²⁷⁶ There is considerable discussion regarding the method and manner of face to face evaluations of the patient.²⁷⁷ All of these requirements must be on file and set forth in the hospital's policies and procedures. The Guidelines dictate that states are free to set requirements by statute or regulation that are more restrictive than the federal regulations so long as they do not conflict with federal requirements. CMS has also included numerous resources for clinicians to provide further guidance.

2. *History and Physical Examinations—Section 482.24(c)(2).*—On November 27, 2006, CMS issued a revised rule requiring that H&Ps be completed no more than thirty days before, or twenty-four hours after, admission for each patient, or prior to a surgery or procedure requiring anesthesia.²⁷⁸ Additionally, an H&P or an update to an H&P, is required prior to surgery and for procedures requiring anesthesia services, regardless of whether care is being provided on an inpatient or outpatient basis.²⁷⁹

The new CoPs expand the permissible professional categories of individuals who may perform an H&P.²⁸⁰ The new rule allows physicians, oral maxillofacial

272. GUIDELINES, *supra* note 276, at 83.

273. *Id.* at 85.

274. *Id.* at 83.

275. *Id.* at 86.

276. *Id.* at 110.

277. *Id.* at 113.

278. Medicare and Medicaid Programs; Hospital Conditions of Participation, 71 Fed. Reg. 68,671, 68,673 (Nov. 27, 2006) (to be codified at 42 C.F.R. pt. 482).

279. *Id.* at 68,674.

280. GUIDELINES, *supra* note 276, at 148.

surgeons, or “other qualified licensed individual[s] in accordance with State law and hospital policy” to perform H&Ps.²⁸¹ The Guidelines interpret such “other qualified practitioners” as including nurse practitioners and physician assistants.²⁸²

The revised CoPs mandate that an H&P performed prior to admission (within at least thirty days before admission) must be updated within twenty-four hours of admission or prior to surgery, whichever comes first.²⁸³ The Guidelines explain that this update must be completed and documented by a licensed practitioner credentialed and privileged by the hospital’s medical staff.²⁸⁴ If the practitioner performing the update finds no change in the patient’s condition since the last H&P was completed, then the practitioner may indicate in the patient’s medical record that the H&P was reviewed, the patient was examined, and may enter “no change” in the patient’s medical record.²⁸⁵ However, if the practitioner finds that an H&P performed prior to admission was incomplete, then the practitioner must conduct and document a new H&P in the medical record within twenty-four hours after admission or registration.²⁸⁶ This must be done prior to the performance of a surgery or procedure requiring anesthesia.²⁸⁷

3. *Authentication of Verbal Orders—Section 482.24(c)(1).*—The CoPs emphasize that hospitals should use verbal orders sparingly, if at all. The Guidelines reiterate that verbal orders must not be a common practice as they increase the risk of miscommunication, which could contribute to error, resulting in an adverse patient event.²⁸⁸ Hospitals are expected to develop appropriate policies and procedures that govern the use of verbal orders and minimize their use.²⁸⁹ If there is no state law that designates a specific timeframe for the authentication of verbal orders, such orders must be authenticated within forty-eight hours.²⁹⁰

All orders, including verbal ones, must be dated, timed, and promptly authenticated by the ordering practitioner.²⁹¹ Verbal orders must be immediately documented in the patient’s medical record and signed by the individual receiving the order.²⁹² CMS expects the nationally accepted “read-back” verification practice to be used for every verbal order.²⁹³ Verbal orders may only be accepted by persons authorized to do so by hospital policy and procedure,

281. *Id.*

282. *Id.* at 149.

283. *Id.* at 150.

284. *Id.*

285. *Id.* at 151.

286. *Id.*

287. *Id.*

288. *Id.* at 166.

289. *Id.*

290. *Id.* at 181.

291. *Id.* at 179.

292. *Id.* at 176.

293. *Id.* at 179.

which must be consistent with federal and state law.²⁹⁴ The receiver of any verbal order must date, time, and sign the verbal order according to hospital policy.²⁹⁵ CMS expects that if verbal orders are received, then the hospital's policy must include a "read-back and verification process[es]."²⁹⁶ Where the ordering practitioner cannot authenticate his or her verbal order, another practitioner who is responsible for the patient's care may authenticate that verbal order.²⁹⁷

4. *Securing Medications—Section 482.25(b)(2)(i).*—Previously, the CoPs required that all drugs and biologicals be kept in a locked storage area.²⁹⁸ Further, all drugs categorized as Schedule II, III, IV, or V were required to be locked in a secure storage area available only to authorized personnel.²⁹⁹ The CoPs now require that all drugs and biologicals be kept in a secure area.³⁰⁰ CMS defines a "secure area" as one that prevents "unmonitored access by unauthorized individuals."³⁰¹ Labor and delivery suites in critical care units staffed twenty-four hours a day are considered secure areas so long as entries and exits are limited to appropriate staff, patients, and visitors.³⁰²

Operating room suites are considered secure only when the areas are staffed and care is being actively provided.³⁰³ The Guidelines go on to state that materials must not be stored in areas that are readily accessible to unauthorized personnel.³⁰⁴ It is also important to note that although the storage of non-controlled drugs and biologicals is a bit more flexible, controlled substances must be kept in locked storage.³⁰⁵ In the event a patient care area is not staffed, hospitals must be sure that both controlled and non-controlled substances are locked up at all times.³⁰⁶ If a hospital uses mobile nursing medication carts, anesthesia carts, epidural carts, or any other type of medication cart that contains controlled substances, all drugs must be locked to prevent unmonitored access.³⁰⁷

When a patient is self-administering his or her medications, hospitals are expected to address this aspect in their policies and procedures to ensure that the medications are secure at the patient's bedside.³⁰⁸

5. *Completion of Post-Anesthesia Evaluation—Section 482.52(b)(3).*—

294. *Id.*

295. *Id.* at 176.

296. *Id.* at 179.

297. *Id.*

298. 42 C.F.R. § 482.25(b)(2)(i) (2008).

299. *Id.* § 482.25(b)(2)(ii).

300. GUIDELINES, *supra* note 276, at 207.

301. *Id.*

302. *Id.*

303. *Id.* at 208.

304. *Id.* at 207.

305. *Id.*

306. *Id.*

307. *Id.* at 208.

308. *Id.*

Under the previous CoPs, only individuals who administered anesthesia could perform post-anesthesia evaluations.³⁰⁹ The revised CoPs now state that post-anesthesia evaluations and documentations may be done by any individual qualified to administer anesthesia.³¹⁰ This revision of the rules grants hospitals and staff much greater flexibility when completing post-anesthesia evaluations. It should also be noted that the new CoPs require post-anesthesia evaluations and documentations be completed within forty-eight hours of surgery.³¹¹

The Guidelines provide greater clarification on the new CoPs regarding post-anesthesia evaluations. CMS requires such an evaluation to be performed any time general, regional, or monitored anesthesia is administered to a patient.³¹² The Guidelines also provide clarification as to the definition of a “practitioner qualified to administer anesthesia,” including in its definition a qualified anesthesiologist, a doctor of medicine or osteopathy, a dentist, and a certified registered nurse anesthetist.³¹³ Anesthesiologist’s assistants may also complete the post-anesthesia evaluation and documentation so long as the anesthesiologist who is supervising the assistant is immediately available.³¹⁴ The Guidelines do not require a post-anesthesia evaluation and documentation to be performed on patients who receive conscious sedation.³¹⁵

B. Revisions to the Hospital Interpretive Guidelines for Infection Control

On November 21, 2007, CMS issued a S&C³¹⁶ to state survey agencies regarding revisions to the Hospital Interpretive Guidelines for Infection Control (Revisions). The Revisions were published in an effort to address the changing infectious disease threats, as well as new mechanisms to confront these threats, that have emerged in recent years.³¹⁷

The Revisions require hospitals “to develop, implement, and maintain an active, hospital-wide program for the prevention, control, and investigation of infections and communicable diseases.”³¹⁸ The program must “be conducted in accordance with nationally recognized infection control practices or guidelines, as well as applicable regulations of other federal or state agencies.”³¹⁹ Furthermore, the program must contain a surveillance component to identify

309. 42 C.F.R. § 482.52(b)(3) (2008).

310. GUIDELINES, *supra* note 276, at 321.

311. *Id.*

312. *Id.* at 322.

313. *Id.*

314. *Id.*

315. *Id.*

316. DEP’T OF HEALTH & HUMAN SERVS., REVISIONS TO THE HOSPITAL INTERPRETIVE GUIDELINES FOR INFECTION CONTROL (2007), *available at* <http://www.cms.hhs.gov/Survey/CertificationGenInfo/downloads/SCLetter08-04.pdf> [hereinafter REVISIONS].

317. *Id.* at 1.

318. *Id.* at 3.

319. *Id.*

infectious risks or communicable disease problems at any particular location within the hospital.³²⁰ The Revisions delineate the obligations of the hospital-appointed infection control officer and the protocols with which he or she must comply.³²¹ The Revisions also discuss the responsibilities of the Chief Executive Officer, Medical Staff, and Director of Nursing Services with regard to infection control.³²²

C. Enforcement of Requirements for Certain Hospital and Critical Access Hospital (CAH) Disclosures to Patients

On December 14, 2007, CMS issued a S&C³²³ to state survey agencies regarding the enforcement of disclosure requirements for certain hospitals and critical access hospitals (CAHs). This memorandum discusses patient disclosure obligations for physician-owned hospitals and CAHs.³²⁴ Under the final rule governing the hospital inpatient prospective payment system, all physician-owned hospitals and CAHs must provide written notice to a patient at the beginning of stay or visit that the hospital or CAH is physician-owned.³²⁵ The purpose of this rule is to enable patients to make an informed decision about his or her care. The notice must be made in a manner reasonably understood by all patients.³²⁶

The final rule amends 42 C.F.R. section 489.12 to enable CMS “to deny a provider agreement to a hospital or CAH applicant that does not have procedures in place to notify patients of physician ownership in the hospital.”³²⁷ Furthermore, CMS may terminate a provider agreement that does not comply with the new disclosure requirements.³²⁸ “Enforcement of the mandatory disclosure requirements is linked to the Patients’ Rights CoP for hospitals and the compliance with Federal, State and local laws and regulations CoP for CAHs.”³²⁹ Compliance with the disclosure requirements will be assessed when the hospital is surveyed for compliance.³³⁰

320. *Id.* at 4.

321. *Id.* at 7-13.

322. *Id.* at 13.

323. DEP’T OF HEALTH & HUMAN SERVS., ENFORCEMENT OF REQUIREMENTS FOR CERTAIN HOSPITALS AND CRITICAL ACCESS HOSPITALS (CAH) DISCLOSURES TO PATIENTS (2007), available at <http://www.cms.hhs.gov/SurveyCertificationGenInfo/downloads/SCLetter08-07.pdf> [hereinafter REQUIREMENTS].

324. *Id.* at 1.

325. *Id.*

326. *Id.*

327. *Id.* at 2.

328. *Id.*

329. *Id.*

330. *Id.* at 3.

VII. CHANGES TO HOSPICE CONDITIONS OF PARTICIPATION

On June 5, 2008, CMS issued a final rule revising the Hospice CoPs, which all hospices are required to meet to participate in the Medicare and Medicaid programs.³³¹ Effective December 2, 2008, the final rule addresses the comments received by CMS on the proposed rule published in 2005.³³² The revised CoPs are a flexible framework for continuous quality improvement in hospice care and reflect current standards of practice. Further, the CoPs focus on a patient-centered, outcome-oriented, and transparent process that promotes quality patient care while allowing for flexibility in meeting quality standards.³³³ The final rule marks CMS' first overhaul of regulations governing the hospice industry since 1983.³³⁴ These CoPs address patient rights and quality of care, as well as the relationship between hospices and the nursing facilities to whose patients they provide services.³³⁵

While many hospice patients are already active in their own treatment plans, this regulation is the first to set out a detailed list of patient rights. Specifically, the rule says that patients who choose hospice, or palliative care, over curative treatment are entitled to such things as participation in the development of his or her plan of care, the right to effective pain management, and the right to choose his or her attending physician.³³⁶

In addition to the patient rights' section, the CoPs created measures for the quality of care of hospice patients. For example, the CoPs require hospices to implement "an effective, ongoing, hospice-wide data-driven quality assessment and performance improvement [(QAPI)] program."³³⁷ The CoPs allow hospices to develop their own QAPI program to cater to their own goals and needs instead of mandating a particular mechanism to implement this program.³³⁸ Furthermore, the CoPs require a comprehensive assessment to take place.³³⁹

Additionally, the CoPs create other quality measures, such as a requirement that patient needs be initially assessed within 48 hours of electing the hospice benefit.³⁴⁰ The rule also requires that a comprehensive assessment occur within five days of electing the hospice and that updated assessments be conducted at least every fifteen days thereafter.³⁴¹ Further, the CoPs create a requirement that

331. Medicare and Medicaid Programs: Hospice Conditions of Participation, 73 Fed. Reg. 32,087 (June 5, 2008) (to be codified at 42 C.F.R. pt. 418).

332. *Id.* at 32,088.

333. *Id.*

334. *Id.*

335. *Id.*

336. *See* 42 C.F.R. § 418.52 (2008).

337. *Id.* § 418.58.

338. Medicare and Medicaid Programs: Hospice Conditions of Participation, 73 Fed. Reg. at 32,118.

339. 42 C.F.R. § 418.54(c) (2008).

340. *Id.* § 418.54(a).

341. *Id.* § 418.54(d).

each patient receive a full drug profile that examines issues ranging from the effectiveness of current drug therapies to potential drug interactions to drug side effects.³⁴² A treatment team will consult with a qualified individual, such as a pharmacist, to ensure that drugs meet the needs of every hospice patient.³⁴³ Moreover, the CoPs recommend the use of a patient-centered interdisciplinary approach that recognizes the contributions of various skilled professionals and other support personnel and their interaction with each other to meet the patients' needs.³⁴⁴

The CoPs also establish certain requirements for relationships among hospices. For instance, the CoPs allow a hospice to contract with another Medicare-certified hospice for nursing, medical, social services, and counseling services under extraordinary or other non-routine circumstances, including travel of a patient outside of the hospice's service area.³⁴⁵ Moreover, the new CoPs remove a previous provision which required an inpatient facility only providing respite care to have a registered nurse on duty twenty-four hours a day.³⁴⁶ Instead, the patients' needs, acuity, and plan of care will drive the nursing and staffing requirements.

Finally, CMS created requirements for hospices with respect to their relationships with nursing facilities. Because a hospice's access to nursing facility patients is directly dependent on the nursing facility's operator, CMS created several additional requirements in an effort to reduce the potential for fraud and abuse. The CoPs require that a written agreement must be in place between a nursing facility and hospice if the hospice provides services in the facility.³⁴⁷ Furthermore, the CoP lists the minimum requirements for such agreements.³⁴⁸

Instead of ensuring quality through a problem-oriented, after-the-fact corrective approach of quality assurance, the CoPs suggest a shift towards a more quality-conscious, preemptive approach to hospice care. This approach will require hospice administrators to review current operating policies and procedures and create agreements with nursing facilities to ensure compliance.

342. *Id.* § 418.54(c)(b).

343. Medicare and Medicaid Programs: Hospice Conditions of Participation, 73 Fed. Reg. at 32,095.

344. *Id.* at 32,088.

345. *Id.* at 32,123; *see also* 42 C.F.R. § 418.64 (2008).

346. Medicare and Medicaid Programs: Hospice Conditions of Participation, 73 Fed. Reg. at 32,134.

347. *Id.* at 32,216; *see also* 42 C.F.R. § 418.112 (2008).

348. Medicare and Medicaid Programs: Hospice Conditions of Participation, 73 Fed. Reg. at 32,216.

VIII. ANTITRUST

A. *Clinical Integration*

In September of 2007, the FTC issued an advisory opinion informing the Greater Rochester Independent Practice Association, Inc. (GRIPA) that it would not challenge the organization's proposed operation as a non-exclusive physician network joint venture. The FTC found that the proposed program would involve substantial integration among its physician participants that had the potential to produce significant efficiencies in the provision of medical services, and that the joint contracting with payors on behalf of the GRIPA's physicians was subordinate and reasonably necessary.³⁴⁹

GRIPA is the fourth in a series of advisory opinions issued by the FTC focusing on clinical integration since clinical integration's first description in the FTC's 1996 *Statements of Antitrust Enforcement Policy in Health Care*.³⁵⁰ In each subsequent opinion, the FTC continues to refine its guidance on the types of programs it considers sufficiently integrated to stave off an antitrust challenge.

In GRIPA, the FTC found that joint contracting was ancillary to the efficiency enhancing purpose of the program.³⁵¹ In reviewing the program, the FTC noted certain key program provisions. Although one of the goals of the program was to increase physician reimbursement, it did so not through market power, but rather through improved quality and more cost-effective utilization. Also, the FTC noted with approval the investment of both time and money that the physicians would be required to undertake in the clinical integration program, including: collaborative development of practice guidelines, coordinated delivery of medical care, and sharing of treatment information through a clinical information system.³⁵² At the end of the day, the FTC concluded that the proposed program was unlikely to have anticompetitive effects or allow GRIPA to exercise market power.³⁵³

Clinical integration continues to be on the FTC's radar screen and will continue to raise antitrust issues. It is becoming clear that multi-specialty programs with strong clinical management, robust outcomes measurement, and significant physician interdependence can generate sufficient efficiencies to overcome the risk of antitrust challenge. Look for the FTC to continue to refine its guidance on clinical integration in the foreseeable future.³⁵⁴

349. FED. TRADE COMM'N, GREATER ROCHESTER INDEP. PRACTICE ASS'N, INC., ADVISORY OPINION 1 (Sept. 17, 2007), *available at* <http://www.ftc.gov/bc/adops/gripa.pdf> [hereinafter GRIPA].

350. U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, STATEMENTS OF ANTITRUST ENFORCEMENT POLICY IN HEALTH CARE (1996), *available at* <http://www.usdoj.gov/atr/public/guidelines/1791.htm>.

351. GRIPA, *supra* note 355, at 1.

352. *Id.*

353. *Id.*

354. *See* FED. TRADE COMM'N TRISTATE HEALTH PARTNERS, INC., ADVISORY OPINION 1 (Apr.

B. Cascade Health Solutions v. PeaceHealth

In *Cascade Health Solutions v. PeaceHealth*³⁵⁵ the Ninth Circuit found that the exclusionary conduct element of a claim, arising under section 2 of the Sherman Act, against a defendant with monopoly power, over one or more of the bundled products, cannot be satisfied by reference to bundled discounts unless the discounts result in prices that are below an appropriate measure of the defendant's costs.³⁵⁶

PeaceHealth and McKenzie-Williamette Hospital (Cascade)³⁵⁷ were the only two hospital care providers in Lane County, Oregon. PeaceHealth operated three hospitals with a total of 464 beds, offering primary, secondary, and tertiary care. Cascade operated one hospital with 114 beds, which provided only primary and secondary care.³⁵⁸ In what Cascade alleged as unlawful monopolization, attempted monopolization, conspiracy to monopolize, tying, exclusive dealing, and violations of state law, PeaceHealth offered insurers discounts of thirty-five to forty percent on tertiary services if the insurers made PeaceHealth their sole preferred provider for *all* services—primary, secondary, and tertiary.³⁵⁹ In essence, PeaceHealth bundled its services, including its tertiary services, which Cascade did not provide to offer bigger discounts across the board in order to obtain an exclusive contract. Because Cascade did not provide tertiary services, it could not match the aggregate savings payors enjoyed under an exclusive contract with PeaceHealth. Thus, the issue became whether the bundled discount amounted to predatory conduct because Cascade was effectively foreclosed from at least one key payor contract.

Consumers are faced with bundled discounts on a daily basis.³⁶⁰ Sometimes bundled discounts are good for consumers because they offer products at lower prices. But sometimes bundled discounts can lead to anti-competitive behavior—offering lower prices to monopolize the market leading to higher

13, 2009), available at <http://www.ftc.gov/os/closings/staff/090413tristateaolletter.pdf>.

355. 515 F.3d 883 (9th Cir. 2008).

356. *Id.* at 903; *cf.* *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 222, 224 (1993) (requiring that a plaintiff prove that defendant's price was below cost and that defendant had a reasonable probability of recouping its investment in below cost prices); *LePage's, Inc. v. 3M*, 324 F.3d 141, 154 (3d Cir. 2003) (en banc) (foregoing cost analysis with respect to defendants with monopoly power, and concluding that all bundled discounts offered by a monopolist are anticompetitive with respect to sellers that do not offer an equally diverse product line), *cert. denied*, 542 U.S. 953 (2004).

357. As a result of a merger with Triad Hospital, Inc., McKenzie's name changed to Cascade Health Solutions. *Cascade*, 515 F.3d at 891.

358. *Id.* "Primary and secondary acute care hospital services are common medical services like setting a broken bone and performing a tonsillectomy . . . '[T]ertiary care' . . . includes more complex services like invasive cardiovascular surgery and intensive neonatal care." *Id.*

359. *Id.* at 892.

360. *See id.* at 894.

prices in the future.³⁶¹ In *Cascade* the Ninth Circuit tried to determine when bundled discounts are “good” and when they are “bad.”

The Ninth Circuit adopted a discount allocation standard that allocates the full amount of the discounts given by the defendant on the bundle to the competitive product or products.³⁶² In other words, the court reallocated the discount amount offered by PeaceHealth for tertiary services to PeaceHealth’s primary and secondary services as if payors paid full charges on tertiary services and discounted amount on primary and secondary services. The court concluded that if the resulting price of the competitive product, or products, is below the defendant’s incremental cost to produce them, the trier of fact may find that the bundled discount is exclusionary for the purpose of section 2.³⁶³ This standard allows a defendant to offer bundled discounts unless the discounts would exclude an equally efficient producer of the product. The Ninth Circuit championed that the discount attribution standard provides clear guidance for sellers that engage in bundled discounting, because a seller can easily ascertain its own price and costs of production and calculate whether its discounting practices run afoul of the standard.³⁶⁴

In adopting the discount allocation standard, the Ninth Circuit rejected the standard set forth in *LePage’s Inc. v. 3M*, thereby creating a split among the circuits over the appropriate legal standard for evaluating bundled discounting practices.³⁶⁵ Because the *LePage’s* standard could insulate a less efficient rival from legitimate competition at the expense of consumer welfare, a discount reallocation methodology should be favored. However, in the health care industry and other industries where seller list prices have little relevance to negotiated rates, a methodology that reallocates the *incremental* discount offered for the bundled products or services should be adopted.

IX. LABOR & EMPLOYMENT

A. *Indiana Case Law Update: Enforceability of Physician Noncompetes*

On March 11, 2008, the Indiana Supreme Court ruled on its first physician covenant not to compete case in nearly twenty-five years.³⁶⁶ The decision will likely impact the enforceability of many existing noncompetition agreements.

From 1996 through 2005, Dr. Kenneth Krueger, a podiatrist, worked with

361. As noted in *Cascade*, “it is possible, at least in theory, for a firm to use a bundled discount to exclude an equally or more efficient competitor and thereby reduce consumer welfare in the long run.” *Id.* at 896 (citing RICHARD A. POSNER, ANTITRUST LAW 236 (2d ed. 2001)).

362. *Id.* at 906.

363. *Id.*

364. *Id.* at 907.

365. *Id.* at 903.

366. Cent. Ind. Podiatry, P.C. v. Krueger, 882 N.E.2d 723 (Ind. 2008). Prior to *Central Indiana Podiatry*, the last physician noncompete case the court ruled on was *Raymundo v. Hammond Clinic Ass’n*, 449 N.E.2d 276 (Ind. 1983).

Central Indiana Podiatry, P.C. (CIP), which maintains offices in counties throughout central Indiana.³⁶⁷ Krueger had worked at CIP offices in Clinton, Marion, Howard, Tippecanoe, and Hamilton counties.³⁶⁸ But, in the last two years of his employment he only split his time at offices in Marion, Tippecanoe, and Howard counties.³⁶⁹ CIP and Krueger had an employment agreement including a noncompete that prohibited Krueger from practicing podiatry for two years in an area defined as fourteen listed central Indiana counties where CIP maintained offices and all counties adjacent thereto, essentially the middle half of the state of Indiana.³⁷⁰ On July 25, 2005, CIP terminated Krueger and in September 2005, Krueger entered into an agreement with Meridian Health Group, P.C. (Meridian) and began practicing podiatry in Hamilton County, Indiana, about ten minutes away from the Indianapolis office at which he had been working with CIP.³⁷¹ Krueger provided Meridian with a copy of the CIP patient list and created a letter to be mailed to patients which stated his new employment was within ten minutes of his previous office.³⁷²

When CIP learned of the letter, it sought injunctive relief against Krueger and damages from Krueger and Meridian on the basis that Krueger's employment violated the geographic restriction of the noncompete.³⁷³ The trial court found that the geographic restriction was unenforceable and denied CIP's request for injunctive relief.³⁷⁴ The court of appeals disagreed and reversed the trial court.³⁷⁵ The Indiana Supreme Court addressed the issue and ultimately ruled the covenant was only enforceable in Marion, Tippecanoe, and Howard counties, affirming the trial court's decision that it was unenforceable elsewhere, particularly as to Hamilton County where Krueger was competing.³⁷⁶

The court began its opinion by reconsidering whether physicians should be able to enter into noncompetition agreements at all, given the nature of the physician-patient relationship.³⁷⁷ The court first addressed this argument in 1983 in *Raymundo v. Hammond Clinic Ass'n*,³⁷⁸ holding that physician noncompetes were not void because of such concerns.³⁷⁹ This conclusion is consistent with the vast majority of other U.S. jurisdictions allowing noncompetes with reasonable

367. *Cent. Ind. Podiatry*, 882 N.E.2d at 725-26.

368. *Id.* at 726.

369. *Id.*

370. *Id.* at 725-26.

371. *Id.* at 726.

372. *Id.*

373. *Id.*

374. *Id.*

375. *Id.* (citing *Cent. Ind. Podiatry, P.C. v. Krueger*, 859 N.E.2d 686, 689 (Ind. Ct. App. 2007), *trans. granted*, 882 N.E.2d 723 (Ind. 2008)).

376. *Id.* at 731.

377. *Id.* at 727-28.

378. 449 N.E.2d 276 (Ind. 1983).

379. *Cent. Ind. Podiatry*, 882 N.E.2d at 728 (citing *Raymundo*, 449 N.E.2d at 280-81).

restrictions.³⁸⁰ The court observed that noncompetes with physicians are different from noncompetes in other business settings where typically only the employer and employee are impacted by enforcement of the noncompete.³⁸¹ Patients are impacted more by physician noncompetes than the average business consumer.³⁸² Patients often seek out particular physicians, and noncompetes may impair patient choice and confidence.³⁸³ The court determined that those concerns require physician noncompetes to be given “particularly careful scrutiny,” even beyond the disfavor with which all noncompetes are viewed.³⁸⁴ But, the court upheld its earlier ruling that physician noncompetes are not void due to those public policy concerns, noting that any contrary decision is better left to the state legislature.³⁸⁵

The court then examined the reasonableness of Krueger’s noncompete covenant.³⁸⁶ In order for a noncompete to be enforceable, it must be reasonable.³⁸⁷ An employer seeking to enforce a noncompete “must first show that it has a legitimate interest to be protected by the agreement.”³⁸⁸ Then, the employer also must show the noncompete is reasonable in its scope “as to time, activity and geographic area restricted.”³⁸⁹ The court found that CIP demonstrated a legitimate interest in preserving patient relationships developed with CIP resources.³⁹⁰ However, it found the geographic scope of the noncompete to be unreasonable because Krueger had not actually used CIP resources to develop patient relationships outside of the areas served by the particular locations at which he had worked in the last two years of his employment.³⁹¹ The Court refused to enforce the noncompete outside areas in which Krueger himself developed patient relationships, even though the CIP had other offices throughout the area covered by the noncompete.³⁹²

As a result of finding the covenant unreasonable, the court then looked to whether any of it could be saved by striking the unreasonable portions from the agreement under what is known as the “blue-pencil” doctrine.³⁹³ Since the

380. *Id.* (citing Ferdinand S. Tinio, Annotation, *Validity and Construction of Contractual Restrictions on Right of Medical Practitioner to Practice, Incident to Employment Agreement*, 62 A.L.R. 3d 1014 §§ 6-25 (1975)).

381. *Id.* at 727.

382. *Id.*

383. *Id.*

384. *Id.* at 729.

385. *Id.* at 728.

386. *Id.* at 728-31.

387. *Id.* at 729 (citing *Raymundo v. Hammond Clinic Ass’n*, 449 N.E.2d 276, 280 (Ind. 1983)).

388. *Id.* (citing *Sharvelle v. Magnante*, 836 N.E.2d 432, 436-37 (Ind. Ct. App. 2005)).

389. *Id.* (citing *Sharvelle*, 836 N.E.2d at 436).

390. *Id.*

391. *Id.* at 730-31.

392. *Id.* at 730.

393. *Id.* (citing *Dicen v. New SESCO, Inc.*, 839 N.E.2d 684, 687 (Ind. 2005)).

Agreement specifically listed particular counties by name, the court was able to strike all of them, except for Marion, Tippecanoe, and Howard counties to create a reasonable and enforceable restriction.³⁹⁴ The court also found it necessary to strike the language extending the noncompete to adjacent, or contiguous, counties.³⁹⁵ The court reasoned that even though Krueger may have developed patient relationships that crossed county lines, there was no evidence to suggest that there was a substantial number of patients developed in all contiguous counties or at their furthest reaches.³⁹⁶ As the non-compete used entire counties as its measure of the restriction, the court deleted entire contiguous counties from its scope, thereby permitting Krueger to compete in Hamilton county, a mere ten minutes away from his former practice.³⁹⁷

B. Federal Statutory Changes

1. FMLA Update.—The National Defense Authorization Act for Fiscal Year 2008 was signed on January 28, 2008.³⁹⁸ This Act includes amendments to the Family and Medical Leave Act (FMLA),³⁹⁹ which provide additional leave benefits to eligible relatives of military service members under two circumstances, “Servicemember Family Leave” and “Qualifying Exigency.”⁴⁰⁰

The first amendment to the FMLA provides an eligible employee a total of twelve weeks of leave during a twelve month period because of any qualifying exigency arising out of the fact that the spouse, son, daughter, or parent of the employee is on active duty or has been notified of an impending call or order to active duty.⁴⁰¹ If foreseeable, an employee requesting leave due to a qualifying exigency must provide reasonable notice.⁴⁰² Under the second amendment, an eligible employee who is the spouse, son, daughter, parent, or next of kin of a covered servicemember is entitled to a total of twenty-six weeks of unpaid leave to care for that servicemember.⁴⁰³ Covered servicemembers include those undergoing medical treatment, recuperation, or therapy, are otherwise in outpatient status, or are on the temporary disability retired list for a serious injury

394. *Id.* at 731.

395. *Id.*

396. *Id.* at 730-31.

397. *Id.* at 731.

398. National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, 122 Stat. 3 (2008).

399. 29 U.S.C. §§ 2601-2654 (2006).

400. On February 11, 2008, the U.S. Department of Labor published additional proposed regulations to significantly modify the FMLA. *See* 29 C.F.R. § 825 (2008). The final regulations became effective January 16, 2009 and included substantive changes and clarifications to the FMLA which are outside the timeframe of this article.

401. 29 U.S.C. § 2611.

402. *Id.*

403. *Id.*

or illness.⁴⁰⁴ This leave is available during a single twelve month period.⁴⁰⁵ Employers may require that eligible employees substitute paid leave for leave taken pursuant to either of the amended FMLA provisions.⁴⁰⁶

2. *Genetic Information Nondiscrimination Act.*—On May 21, 2008, President Bush signed into law the Genetic Information Nondiscrimination Act (GINA) of 2008.⁴⁰⁷ GINA bars health insurers and employers from discriminating against individuals or individual's family members based on their genetic information.⁴⁰⁸ Under GINA, genetic information is broadly defined as an individual's genetic tests, the genetic tests of family members, or the manifestation of a disease or disorder in the individual's family members.⁴⁰⁹ The expectation is that GINA will enable individuals to take advantage of genetic testing, technology, research, and new therapies without fear of retaliation from health insurers or employers.

As it relates to health insurers, GINA amends several federal laws, including the Employee Retirement Income Security Act of 1974 (ERISA), the Public Health Service Act, the Internal Revenue Code of 1986, the Social Security Act, and the Health Insurance Portability and Accountability Act (HIPAA) to include anti-discrimination provisions.⁴¹⁰ GINA prohibits health insurers from adjusting premium amounts or establishing distinct eligibility rules based on genetic information. It also prohibits requesting or requiring genetic tests, or requesting, requiring, or purchasing genetic information for underwriting or enrollment purposes.⁴¹¹ These restrictions apply to insurers of group health plans, individual market plans, government plans, and Medicare supplemental policies.⁴¹²

As it relates to employment, GINA covers employers, employment agencies, labor organizations, and joint-labor management committees.⁴¹³ GINA carves out the actions employers may take with an applicant or employee's genetic information, as well as how employers should maintain this sensitive information. Unlawful employment actions under GINA include: (1) using genetic information such as family history of a hereditary disease, to make hiring, firing, or other employment decisions that affect the compensation, terms, conditions, or privileges of employment;⁴¹⁴ (2) limiting, segregating, or classifying employees because of genetic information in any way that would deprive employees of employment opportunities or otherwise adversely affect

404. *Id.*

405. *Id.*

406. *Id.*

407. 42 U.S.C. § 2000ff (2006).

408. *Id.* § 2000ff-1(a).

409. *Id.* § 2000ff-4.

410. *Id.* § 2000ff-5.

411. *Id.*

412. *Id.*

413. *Id.* §§ 2000ff-1 to -3.

414. *Id.* § 2000ff-1.

employment status;⁴¹⁵ (3) requesting, requiring or purchasing an employee's or an employee's family member's genetic information, absent one of the prescribed exceptions;⁴¹⁶ or (4) except under certain conditions,⁴¹⁷ disclosing an applicant's or an employee's genetic information.⁴¹⁸ Regarding employment discrimination, GINA is effective November 21, 2009 and will be enforced by the Equal Opportunity Commission (EEOC).⁴¹⁹ The EEOC proposed regulations on March 2, 2009 to carry out GINA's employment-related provisions.⁴²⁰ The final regulations must be enacted by May 21, 2009.

3. *ADA Amendments Act*.—On September 25, 2008, the ADA Amendments Act of 2008 (Act) was passed and became effective January 1, 2009.⁴²¹ Most significantly, this Act amended the Americans with Disabilities Act of 1990 (ADA).⁴²² An individual is disabled under the ADA if the individual has “a physical or mental impairment that substantially limits one or more major life activities,” has a record of such impairment, or is regarded as having such an impairment.⁴²³ The Act was primarily aimed at reversing some significant U.S. Supreme Court interpretations of the ADA within the last decade, specifically regarding who is “disabled,” and therefore, protected under the ADA.⁴²⁴ Despite

415. *Id.*

416. *Id.* There are several exceptions to this prohibition, including where: (1) an employee provides prior written authorization; (2) genetic services are offered by the employer; (3) the information is inadvertently acquired; (4) the information is obtained for compliance with certification requirements of Family and Medical Leave laws; (5) the information is used for genetic monitoring of the biological effects of toxic substances in the workplace under limited conditions; or (6) the information is required for an employer's forensic laboratory's DNA analysis for law enforcement or human remains identification purposes. *Id.* Also, an employer's acquisition of genetic information through the purchase of public materials such as newspapers or magazines is not unlawful. *Id.*

417. *Id.* § 2000ff-5. Disclosing information is allowed under certain conditions. For example: (1) to an employee upon written request; (2) to an occupational or other health researcher; (3) by court order; (4) to a government official investigating compliance with GINA if the information is relevant to the investigation; (5) in connection with an employee's compliance with FMLA certification provisions; (6) or to a public health agency where the manifestation of a disease or disorder concerns a contagious disease that presents an imminent hazard of death or life-threatening illness. *Id.*

418. *Id.* § 2000ff(2)(A)(i).

419. *Id.* § 2000ff-6.

420. Regulations Under the Genetic Information Nondiscrimination Act of 2008, 74 Fed. Reg. 9056 (proposed Mar. 2, 2009) (to be codified at 29 C.F.R. pt. 1635).

421. ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008).

422. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (1990).

423. 42 U.S.C. § 12102 (2006).

424. *Id.* § 12101. The holding of the Supreme Court in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), *superseded by statute*, ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553, and its companion cases narrowed the broad scope of protection intended to be afforded by the ADA, thus eliminating from ADA protection many individuals whom Congress intended to

the intended broad coverage of the ADA, Congress found that courts incorrectly narrowed the definition of disability and scope of protection under the ADA.⁴²⁵

As a result, the Act made several changes. Highlights of the Act include: (1) construing disability in favor of broad coverage;⁴²⁶ (2) setting forth specific major life activities and the types of bodily functions that are covered under the law;⁴²⁷ (3) broadening protection afforded to individuals who are not actually disabled, but are “regarded as” being disabled, by clarifying that individuals who are “regarded as” having an impairment are protected under the Act regardless of whether the impairment limits, or is perceived to limit, a major life activity;⁴²⁸ (4) declaring that the ameliorative effects of mitigating measures, except for ordinary eyeglasses and contact lenses, should not be considered in determining if individuals are disabled;⁴²⁹ (5) indicating that impairments which are episodic or in remission are still covered under the ADA if, when active, the impairment would substantially limit a major life activity;⁴³⁰ (6) clarifying that reasonable accommodation is not required for individuals who are only regarded as being disabled;⁴³¹ and (7) stating that individuals cannot be regarded as disabled for only having an impairment that is minor and lasts for six months or less, unless impairments that are episodic or in remission.⁴³²

X. INDIANA LEGISLATIVE UPDATE

A. *House Enrolled Act 1001: State Assumption of HCI Levy*

Property tax reform was one of the primary issues of concern during the 2008 Indiana legislative session after many Indiana residents saw significant increases in their property taxes months before the session began.⁴³³ To relieve local property tax burdens, the Indiana State government elected to assume responsibility for the hospital care for the indigent fund, which was traditionally funded by a local hospital care for the indigent tax. The State also decided to provide a certain level of funding to the Health & Hospital Corporation of

protect. The scope of the ADA was further narrowed by the Supreme Court in *Toyota Motor Manufacturing Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002), *superseded by statute*, ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553. As a result, lower courts incorrectly found in individual cases that people with a range of substantially limiting impairments were not disabled under the ADA.

425. 42 U.S.C. § 12101.

426. *Id.* § 12102.

427. *Id.*

428. *Id.*

429. *Id.*

430. *Id.*

431. *Id.* § 12201.

432. *Id.* § 12102.

433. Larry DaBoer, *The Impact of Property Tax Legislation on Indiana Households*, 83 IND. BUS. REV., Spring 2008, at 1, 5.

Marion County, which had also historically been funded by local taxes. These changes provided local tax relief while preserving funding for health care to the indigent.

Since 1986, each county has levied a local tax on its residents to fund the county hospital care for the indigent fund. Proceeds from the taxes and the fund were used to reimburse certain qualified hospitals for uncompensated care they provided to a county's indigent residents. House Bill 1001, which was subsequently enacted in House Enrolled Act 1001 (HEA 1001), implemented comprehensive property tax reform and provides that the state government is responsible for adequate funding for the new state hospital care for the indigent fund.⁴³⁴ The legislation effectively eliminates the local tax that had, since 1986, funded indigent health care and shifts the burden of paying these costs to the state. Further, HEA 1001 amends the Indiana Code to require the State of Indiana to provide \$40 million to fund the Health & Hospital Corporation of Marion County, which operates Wishard Memorial Hospital and provides a substantial amount of indigent care.⁴³⁵ The changes set forth in HEA 1001, while alleviating local tax burdens, also preserve important funding streams to hospitals so that they may continue to provide care to the indigent population of Indiana.

B. Senate Enrolled Act 42: Holding Medicaid Payors Accountable

The Indiana State Legislature took steps towards holding managed care organizations participating in the Indiana Medicaid program (Program) accountable for complying with their contracts with the Program. Senate Bill 42, enacted as Senate Enrolled Act 42 (SEA 42), requires the Select Joint Commission on Medicaid Oversight⁴³⁶ (Commission) "to [d]etermine whether a managed care organization that has contracted with the office to provide Medicaid services has properly performed the terms of the managed care organization's contract with the state."⁴³⁷ SEA 42 also requires certain managed care organizations participating in the Program to: (1) be accredited by the National Committee for Quality Assurance within certain timeframes and (2) accept electronic claims for payment.⁴³⁸ Finally, SEA 42 repeals a provision under which the Commission would have expired as of December 31, 2008.⁴³⁹ This legislation increases the oversight duties of the Commission so that it may scrutinize managed care organizations participating in the Program and ensure

434. H.B. 1001, 115th Gen. Assem., Reg. Sess. (Ind. 2008) (amending IND. CODE § 12-16-7.5-4.5 (2006 & Supp. 2008)).

435. *Id.*

436. The Commission had been created by the Indiana State Legislature before passage of S.B. 42 to oversee general Medicaid matters involving claims, errors, reimbursement and other issues involving the state Medicaid program. IND. CODE § 2-5-26-8 (2006 & Supp. 2008).

437. S.B. 42, 115th Gen. Assem., Reg. Sess. (Ind. 2008) (amending IND. CODE § 2-5-26-8 (2006 & Supp. 2008)).

438. *Id.*

439. *Id.*

that these organizations are complying with the terms of their contracts with the Program, preventing future abuses of the Program, and increasing Program efficiency.

C. Senate Enrolled Act 350: Community Mental Health Centers

The Indiana Legislature committed to establish and fund community health centers in 2008 by enacting Senate Bill 350 into law.⁴⁴⁰ Community health centers are federally funded “community-based and patient-directed organizations that serve populations with limited access to health care . . . [including] . . . low income populations, the uninsured, those with limited English proficiency, migrant and seasonal farm workers, individuals and families experiencing homelessness, and those living in public housing.”⁴⁴¹ Community health centers qualify for federal funding if they meet certain federal requirements, but federal funding may not always provide a sufficient level of resources to keep community health centers operational.⁴⁴² S.B. 350 helps to resolve this problem.

Senate Enrolled Act 350 (SEA 350) requires a county (other than Marion County) to transfer money within a specified time frame to the Division of Mental Health and Addiction (Division) to satisfy the non-federal share of medical assistance payments to community mental health centers for (1) certain administrative services and (2) community mental health rehabilitation services.⁴⁴³ It also permits the Health & Hospital Corporation of Marion County to make payments to the Division for the operation of a community mental health center.⁴⁴⁴ SEA 350 also requires the Division to ensure that the non-federal share of funding received from a county is applied only for a county’s designated community mental health center and specifies the manner in which the Division may distribute certain excess state funds.⁴⁴⁵ Finally, it provides that the county tax levy for community mental health services is allocated for operational expenses of community mental health centers and that provisions of the bill are applicable only to the extent that the congressional moratorium on the implementation of certain rules by the U.S. Secretary of Health and Human Services is not extended and other restricted rules are implemented.⁴⁴⁶ The enactment of SEA 350 shows the Indiana State Legislature’s dedication to indigent care by funding community health centers that offer significant health care solutions to this population.

440. S.B. 350, 115th Gen. Assem., Reg. Sess. (Ind. 2008).

441. Health Resources and Services Administration, The Health Center Program: What Is a Health Center?, <http://bphc.hrsa.gov/about/> (last visited July 3, 2009).

442. 42 C.F.R. § 51c.101 (2008).

443. S.B. 350, 115th Gen. Assem., Reg. Sess. (Ind. 2008).

444. *Id.*

445. *Id.*

446. *Id.*

SURVEY OF RECENT DEVELOPMENTS IN INSURANCE LAW

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During this survey period,¹ the Indiana appellate and federal courts addressed many cases in the fields of automobile, homeowners, and commercial insurance. A large number of decisions focused upon uninsured/underinsured motorist coverage. This Article examines the most significant decisions and discusses their impact on the field of insurance law.²

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1. The survey period for this Article is approximately November 1, 2007 to October 31, 2008.

2. For cases that were decided during the survey period but are not discussed in this Article, see *Nautilus Insurance Co. v. Reuter*, 537 F.3d 733 (7th Cir. 2008) (applying “most intimate contacts” test as Indiana’s choice of law principle, and concluding that commercial general liability insurer did not owe coverage for victims claims of negligent hiring and supervision of insured’s employees); *Carolina Casualty Insurance Co. v. Estate of Studer*, 555 F. Supp. 2d 972 (S.D. Ind. 2008) (finding that trucking liability insurer did not act in bad faith by interpleading policy limits for court to allocate among injured claimants); *Economy Premier Assurance Co. v. Wernke*, 521 F. Supp. 2d 852 (S.D. Ind. 2007) (applying intentional acts exclusion in liability policy to exclude coverage to insured for striking claimant in the face); *Old Republic Insurance Co. v. RLI Insurance Co.*, 887 N.E.2d 1003 (Ind. Ct. App. 2008) (determining priority of insurance coverages available to truck driver involved in accident), *trans. denied*, 2009 Ind. LEXIS 2391 (Ind. Mar. 5, 2009); *Allstate Insurance Co. v. Fields*, 885 N.E.2d 728 (Ind. Ct. App. 2008) (concluding that insurer did not breach its duty of good faith to insured when it refused to pay its policy limits when demanded by insured), *trans. denied*, 2009 Ind. LEXIS 31 (Ind. Jan. 15, 2009); *General Casualty Insurance Co. v. Bright*, 885 N.E.2d 56 (Ind. Ct. App. 2008) (holding that policy’s one-year limitation of action clause did not apply to prohibit insurer’s lawsuit against insured to void coverage); *Allianz Insurance Co. v. Guidant Corp.*, 884 N.E.2d 405 (Ind. Ct. App. 2008) (addressing a number of issues relating to the insurer’s duty to defend the insured, including a discussion of the duty when an insured possesses a policy deductible or a self-insured retention), *trans. denied*, 2009 Ind. LEXIS 19 (Ind. Jan. 8, 2009); *French v. State Farm Fire & Casualty Co.*, 881 N.E.2d 1031 (Ind. Ct. App. 2008) (concluding that insured may be entitled to difference in premium when insurance agent may have sold unnecessary insurance to insured); *Insuremax Insurance Co. v. Bice*, 879 N.E.2d 1187 (Ind. Ct. App.) (finding a question of fact existed on insurer’s ability to void policy because of insured’s alleged misrepresentation of accident details), *trans. denied*, 891 N.E.2d 50 (Ind. 2008); *Billboards “N” Motion, Inc. v. Saunders-Saunders & Assoc., Inc.*, 879 N.E.2d 1135 (Ind. Ct. App.) (concluding that insurance agent is not responsible for failing to advise insured on type or amount of insurance coverage to obtain absent a special relationship), *trans. denied*, 891 N.E.2d 51 (Ind. 2008); *American Family Mutual Insurance Co. v. Matusiak*, 878 N.E.2d 529 (Ind. Ct. App. 2007) (addressing whether homeowners insurance policy applied to hail damage claim to house that was in process of being sold), *trans. denied*, 898 N.E.2d 1218 (Ind. 2008); *McMurray v. Nationwide Mutual Insurance Co.*, 878 N.E.2d 488 (Ind. Ct. App. 2007) (prorating underinsured motorist coverage under two applicable insurance policies), *trans. denied*, 891 N.E.2d 50 (Ind. 2008); *Spacey v. State Farm Fire & Casualty Co.*, 878 N.E.2d 297 (Ind. Ct. App. 2007) (interpreting ten-day cancellation of policy period in IND. CODE § 27-7-12-13 (2004) referenced

I. AUTOMOBILE COVERAGE CASES

A. Courts Address Whether Claims for Emotional Distress Damages Constitute "Bodily Injury" Under Automobile Insurance Policy

The insurance coverage issue that received the most attention during this survey period was whether an insured's claim for emotional distress satisfied the definition of "bodily injury"³ to be entitled to coverage. Indiana's appellate courts addressed the issue on three occasions in the context of uninsured or underinsured motorist coverage, while another decision addressed it on a liability claim. A number of interesting outcomes followed from these decisions.

In *State Farm Mutual Auto Insurance Co. v. Jakupko*,⁴ a father drove an automobile with his wife and two children as passengers.⁵ Unfortunately, the family was involved in an automobile accident with an underinsured motorist.⁶ The father was seriously injured in the accident, and the wife and one child suffered emotional distress as a result of being in the car and witnessing the father's injuries.⁷

The family possessed underinsured motorist insurance coverage with State Farm which had limits of \$100,000 for claims of "each person" and \$300,000 for "each accident."⁸ State Farm paid \$100,000 to the father to satisfy his claim.⁹ However, State Farm denied the remaining family members' claims seeking an additional \$200,000 for emotional distress by contending that their claims arose from the father's injuries, and were included in the amount paid to satisfy the father's claim.¹⁰

The trial court and Indiana Court of Appeals concluded that State Farm's interpretation that the family members' claims were included in the father's

calendar as opposed to business days); *Smith v. Auto-Owners Insurance Co.*, 877 N.E.2d 1220 (Ind. Ct. App. 2007) (applying a "discovery rule" for determining when an insured should have realized that a tortfeasor's insurer became insolvent in order to have an uninsured motorist claim to pursue), *trans. denied*, 891 N.E.2d 43 (Ind. 2008); *Vectren Energy Marketing & Service, Inc. v. Executive Risk Specialty Insurance Co.*, 875 N.E.2d 774 (Ind. Ct. App. 2007) (members of a limited liability corporation lacked standing to sue corporation's insurer for a coverage declaration).

3. Most standard insurance policies define "bodily injury" to mean "bodily injury to a person and sickness, disease or death which results from it." *See, e.g.*, *State Farm Mut. Auto. Ins. Co. v. Jakupko*, 881 N.E.2d 654, 656 (Ind. 2008). Indiana's uninsured/underinsured motorist statute requires coverage to apply to "bodily injury, sickness or disease." IND. CODE § 27-7-5-2(a)(1) (2004).

4. 881 N.E.2d 656 (Ind. 2008).

5. *Id.* at 655.

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

claim contravened Indiana's underinsured motorist statute.¹¹ The Indiana Supreme Court agreed with the lower courts.¹² That court first observed that it was undisputed that the family members sustained an "impact" from the accident such that they could seek to recover for their claims under Indiana law.¹³

The supreme court also determined that the family members' emotional distress claims satisfied the policy and statutory definition of "bodily injury."¹⁴ Because an emotional distress claim involves "mental anguish," the court concluded that this demonstrated a "sickness" under the definition of "bodily injury."¹⁵

The court also rejected State Farm's claim that the family members' emotional distress claim was included in its payment to the father of the "per person" limits.¹⁶ The court concluded that Indiana's underinsured motorist statute prevents State Farm from attempting to limit the family members' claims by lumping them together with the father's claim.¹⁷ Thus, the family members were entitled to assert separate per person claims of \$100,000 up to the per accident limit of \$300,000.¹⁸

On the same day that the Indiana Supreme Court decided the *Jakupko* case, it also decided *Elliott v. Allstate Insurance Co.*¹⁹ Factually, the *Elliott* case is very similar to *Jakupko* except *Elliott* involved a mother who was driving a car with her sister and daughter as passengers when they had an accident with an uninsured motorist.²⁰ The mother was insured with Allstate, who paid her the "each person" uninsured motorist limit of \$25,000.²¹ The sister and daughter sought the remaining \$25,000 of "each accident" uninsured motorist coverage limits for their emotional distress claims after witnessing the mother's injuries.²²

The trial court agreed with Allstate that the passengers' claims were included in the payment made to the mother for her claims.²³ The Indiana Court of Appeals reversed the trial court by concluding that the emotional distress claims of the passengers were entitled to their own separate limits of liability.²⁴

The Indiana Supreme Court agreed with the court of appeals.²⁵ Referencing

11. *Id.* at 661.

12. *Id.*

13. *Id.* at 656. For analysis of Indiana's law on ability to recover emotional distress damages, see *Shaumber v. Henderson*, 579 N.E.2d 452 (Ind. 1991).

14. *Jakupko*, 881 N.E.2d at 658.

15. *Id.*

16. *Id.* at 662.

17. *Id.*

18. *Id.*

19. 881 N.E.2d 662 (Ind. 2008).

20. *Id.* at 663.

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.* at 665.

its newly issued decision in *Jakupko*, the court found that Allstate's attempt to restrict the passengers' claims for uninsured motorist coverage violated Indiana's uninsured motorist statute.²⁶

The decision of *State Farm Mutual Automobile Insurance Co. v. D'Angelo*²⁷ was the third uninsured/underinsured motorist case addressing emotional distress claims. A child bicyclist was seriously injured and eventually died when he was struck by an underinsured motorist.²⁸ The child's mother did not witness the crash, but came upon the scene shortly after it happened.²⁹ The mother attempted to lift the vehicle off of the child, and she also observed the emergency personnel treating the child.³⁰ As a result, she suffered from emotional distress.³¹

The underinsured motorist's liability insurer paid its limits of \$25,000 for the child's wrongful death claim and an additional \$25,000 for the mother's claim for negligent infliction of emotional distress.³² The mother then presented an underinsured motorist claim to her insurance carrier, State Farm, seeking redress for the child's wrongful death and the mother's emotional distress.³³ State Farm paid an additional \$75,000 for the wrongful death claim to satisfy the \$100,000 policy limit.³⁴ However, State Farm denied that the mother possessed an underinsured motorist claim under the policy because it believed that she did not sustain a separate bodily injury independent of any injury sustained by the child.³⁵

The trial court granted summary judgment to the mother on her claim by finding that State Farm's interpretation of the policy violated Indiana's underinsured motorist statute.³⁶ The Indiana Court of Appeals reversed the trial court.³⁷ The court concluded that the mother's claims for emotional distress arose because she witnessed the child's *injuries*, not the child's *accident*.³⁸ Thus, her claim arose from the child's bodily injury, and was limited in recovery of underinsured motorist benefits to the amount paid to the child for his injury and death.³⁹

Additionally, such a finding limited the mother's ability to seek any coverage pursuant to the policy's "Each Accident" limit.⁴⁰ Because such additional

26. *Id.* at 664; *see also* IND. CODE § 27-7-5-2(a)(1) (2004).

27. 875 N.E.2d 789 (Ind. Ct. App. 2007), *trans. denied*, 891 N.E.2d 42 (Ind. 2008).

28. *Id.* at 791.

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.* at 792.

34. *Id.*

35. *Id.*

36. *Id.* at 794-95; *see* IND. CODE § 27-7-5-2 (2004) (Indiana's underinsured motorist statute).

37. *D'Angelo*, 875 N.E.2d at 800.

38. *Id.* at 798.

39. *Id.*

40. *See id.*

coverage limits applied to a person sustaining a bodily injury while “actually involved in the accident,” the mother clearly did not qualify as she witnessed the post-accident events.⁴¹ The court also concluded that Indiana’s underinsured motorist statute was not violated by State Farm’s policy language.⁴²

The final emotional distress claim involved a third party liability claim, as opposed to a first party uninsured/underinsured motorist claim, but it was issued on the same date as the *Jakupko* and *Elliott* decisions. In *State Farm Mutual Automobile Insurance Co. v. D.L.B. ex rel. Brake*,⁴³ a young child witnessed his cousin being struck and killed by a motorist while they rode their bikes.⁴⁴ The child sustained no personal injury, but did suffer from traumatic stress.⁴⁵

At the time of the accident, State Farm insured the motorist.⁴⁶ State Farm paid its limits to the deceased cousin’s parents to settle their claims against the motorist.⁴⁷ However, State Farm denied the child witness’ liability claim for emotional distress because he did not sustain “bodily injury” as required by the policy.⁴⁸

Both the trial court and Indiana Court of Appeals found that the child was entitled to pursue a liability claim against the motorist as his claim for emotional distress satisfied the definition of “bodily injury” in the motorist’s policy.⁴⁹ The Indiana Supreme Court reversed the two lower courts and concluded that no coverage was available for the emotional distress claim.⁵⁰ Relying upon its decision in *Jakupko*, the court concluded that because the child sustained no impact from the accident, his emotional distress damages did not satisfy the definition of “bodily injury,” which required some “bodily touching” or impact.⁵¹

These cases are very instructive in dealing with emotional distress claims and whether they satisfy the definition of “bodily injury” in an insurance policy. The cases indicate that emotional distress claims do satisfy the definition if they include an impact; however, a bystander who witnesses the accident or comes upon the accident shortly after it happens, will not satisfy the definition.

41. *Id.*

42. *Id.* at 800. It is interesting to observe that the Indiana Supreme Court denied transfer on the *D’Angelo* decision after it decided *Jakupko* and *Elliott*. Thus, it can be argued that the supreme court probably recognized a clear distinction in the cases which supports the court of appeals decision.

43. 881 N.E.2d 665 (Ind. 2008).

44. *Id.* at 665.

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.* at 666.

49. *Id.*

50. *Id.*

51. *Id.*; see also *State Farm Mut. Auto. Ins. Co. v. Jakupko*, 881 N.E.2d 654, 659 (Ind. 2008); *Wayne Twp. Bd. of Sch. Comm’rs v. Ind. Ins. Co.*, 650 N.E.2d 1205, 1210 (Ind. Ct. App. 1995).

B. Policy Exclusion for Use of Rental Vehicle Upheld Despite Indiana Statute Defining Primary Coverage Responsibility

An insurance coverage issue that frequently arises focuses upon the primary insurance responsibility for vehicle renters involved in accidents. In *Safe Auto Insurance Co. v. Enterprise Leasing Co.*,⁵² the insured rented a truck from a rental company for an out-of-state trip because the insured believed his vehicle was unreliable, and he wanted to transport his motorcycle in a more reliable rental truck.⁵³ In executing the rental contract, the insured declined to purchase the rental company's liability protection for the truck.⁵⁴

While the insured was using the truck in a state other than Indiana, he was involved in an accident that produced personal injuries to another motorist.⁵⁵ At the time of the rental, the insured possessed a liability insurance policy with Safe Auto.⁵⁶ The injured motorist filed a complaint against the insured, and Safe Auto hired counsel to defend the insured under a reservation of rights.⁵⁷ The case eventually settled for an amount equal to the insured's policy limits with Safe Auto.⁵⁸

Safe Auto filed a declaratory judgment action, contending that it did not owe liability coverage to the insured because of an exclusion which stated:

[Safe Auto] will provide liability coverage for any auto [an insured rents] from a car rental agency or garage, ONLY while your covered auto is being serviced or repaired, or it if [sic] has been stolen or destroyed. PLEASE NOTE THAT NO COVERAGE IS AFFORDED TO VEHICLES RENTED FOR REASONS OTHER THAN THOSE STATED ABOVE.⁵⁹

Because the insured's personal automobile was not being repaired and was not stolen, Safe Auto argued that its insurance coverage was excluded, and therefore, the rental company possessed the insurance coverage obligation.

The rental company contended that Safe Auto's policy exclusion was contrary to an Indiana statute that defined the primary insurance obligation on leased vehicles.⁶⁰ The statute in question provides:

When a claim arises from the operation of a motor vehicle leased under a written lease agreement, if under the agreement the lessee agrees to provide coverage for damage resulting from his operation of the vehicle, then the motor vehicle insurance coverage of the lessee is primary. No

52. 889 N.E.2d 392 (Ind. Ct. App. 2008), *reh'g denied*.

53. *Id.* at 394.

54. *Id.*

55. *Id.* at 395.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

claim may be made against any coverage available for the vehicle by the lessor until the limits of the motor vehicle insurance coverage provided by the lessee for the vehicle are exhausted.⁶¹

The trial court granted the rental company's motion for summary judgment.⁶² On appeal, the Indiana Court of Appeals reversed.⁶³ The court found that there was no agreement between the insured and the rental company for the insured to provide insurance coverage which was necessary for application of the statute.⁶⁴ In fact, the insured testified that he did not expect Safe Auto's policy to cover the rented truck even though he declined to purchase the rental company's supplemental insurance.⁶⁵

The court also commented in dicta that even if the primary insurance statute was applicable, it would not invalidate Safe Auto's policy exclusion.⁶⁶ Instead, the statute clarifies the primary insurance obligation when two applicable policies conflict.⁶⁷ The court suggested that Indiana's General Assembly, rather than the judicial system, was the proper forum for public policy arguments to prevail on the validity of Safe Auto's exclusion for coverage of rented vehicles.⁶⁸

The court's analysis that the statute did not apply appears correct because the Safe Auto policy excluded coverage for this particular situation. This decision properly enforced the terms of the insurance policy.

C. Court Refuses to Permit Forced Assignment by Insured of Breach of Duty of Good Faith Claim Against Insurer

When an insured has insufficient insurance coverage to address an injured plaintiff's damages, the insured usually is agreeable to assigning to the plaintiff any potential claim for breach of duty of good faith by the insurer, in exchange for the plaintiff's agreement not to attempt to collect the excess judgment from the insured. However, in *State Farm Mutual Automobile Insurance Co. v. Estep*,⁶⁹ the insured refused to agree to the assignment.⁷⁰ The interesting questions addressed in that case focused upon whether the plaintiff could force the insured to assign the claim and whether the insurer had a right to intervene in the supplemental stage of the lawsuit against the insured.

The facts revealed that the insured was intoxicated when he struck the plaintiff who was riding on a motorcycle.⁷¹ As a result of the impact, plaintiff

61. IND. CODE § 27-8-9-9 (2003).

62. *Enter. Leasing Co.*, 889 N.E.2d at 395.

63. *Id.* at 398.

64. *Id.* at 397.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. 873 N.E.2d 1021 (Ind. 2007).

70. *Id.* at 1023.

71. *Id.* at 1022 n.1.

suffered devastating injuries which ultimately led to the plaintiff's untimely death.⁷² Before his death, the plaintiff filed a lawsuit against the insured.⁷³ The insured possessed an insurance policy with bodily injury liability limits of \$50,000 with State Farm.⁷⁴ State Farm hired defense counsel for the insured, and the insured also retained his own personal counsel.⁷⁵ State Farm repeatedly offered the insured's full bodily injury limits to the plaintiff in exchange for a release of all claims, but the plaintiff refused all offers.⁷⁶

The case proceeded to trial, and a jury awarded the plaintiff \$650,000 in compensatory damages and \$15,000 in punitive damages.⁷⁷ State Farm paid the plaintiff the \$50,000 of bodily injury limits, and the defense counsel it hired to defend the insured withdrew from representing the insured.⁷⁸ The plaintiff instituted supplemental proceedings against the insured seeking the remaining \$615,000 of the jury's award.⁷⁹ The plaintiff requested that the insured voluntarily assign to him any potential bad faith claim against State Farm, but the insured refused by contending that there was no justifiable basis to claim that State Farm committed a breach of its duty of good faith.⁸⁰

The plaintiff requested that the court issue an order requiring the insured to assign any claim he had against State Farm to the plaintiff.⁸¹ When this request was made, State Farm was not a party to the proceedings supplemental.⁸² Despite the insured's objection, the court ordered the insured to assign any potential claim it possessed against State Farm to the plaintiff.⁸³

After receiving the forced assignment, the plaintiff filed a separate lawsuit against State Farm and the insured's personal counsel in Illinois in an attempt to recover the outstanding jury award.⁸⁴ Upon receiving notice of the lawsuit and assignment, State Farm moved to intervene in the Indiana litigation and challenge the assignment.⁸⁵ When the trial court denied both of State Farm's motions, State Farm appealed.⁸⁶

On appeal, the Indiana Court of Appeals reversed the trial court, and concluded that State Farm should have been granted the right to intervene.⁸⁷ The

72. *Id.* at 1022-23.

73. *Id.* at 1023.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.* at 1023-24.

85. *Id.* at 1024.

86. *Id.*

87. *Id.*

court of appeals also found that a forced assignment of a potential bad faith claim could be made, but only if the court first determined that a viable claim existed.⁸⁸

The supreme court granted transfer.⁸⁹ That court agreed with the court of appeals that State Farm should have been permitted to intervene to challenge the assignment.⁹⁰ The court also concluded that the forced assignment was improper under Indiana law.⁹¹ The court observed that forced assignments of potential bad faith claims were contrary to Indiana's Direct Action Rule, which prohibits a third party to the insurance contract from bringing a lawsuit directly against an insurance company for bad faith or to recover an excess judgment.⁹² The court also found that allowing such an action would detrimentally change the "special relationship"⁹³ that exists between an insured and insurer when a plaintiff sues the insured by creating more potential conflicts of interest.⁹⁴ Finally, the court found that to permit such a forced action would increase insurance costs to all insureds, which includes insureds who found the defense provided by their insurance company satisfactory.⁹⁵

The court also commented upon the fact that State Farm's exposure risk was significantly increased beyond any premium paid by the insured if a forced assignment was permitted.⁹⁶ As demonstrated by this case, State Farm received premiums for \$50,000 of liability insurance coverage which it provided to its insured.⁹⁷ To permit a forced assignment, State Farm's potential exposure was for the full amount of the judgment against the insured, even though State Farm offered its policy limits repeatedly to attempt to settle the case.⁹⁸

In this case, it appears appropriate that a forced assignment against State Farm was not permitted after it repeatedly attempted to settle the case by offering its policy limits. However, a potential bad faith claim is an asset⁹⁹ of the insured that a creditor, such as the plaintiff, should be able to seek in proceedings supplemental, even if by forced assignment. If forced assignments are allowed,

88. *Id.*

89. *Id.* at 1028.

90. *Id.* at 1024 n.6. The Indiana Supreme Court determined, however, that State Farm should have been permitted to intervene pursuant to Indiana Trial Rule 24(B) ("permissive intervention") as opposed to the court of appeals' conclusion that intervention was as a matter of right under Indiana Trial Rule 24(A). *Estep*, 873 N.E.2d at 1024 n.6 (citing IND. TRIAL R. 24).

91. *Estep*, 873 N.E.2d at 1027.

92. *Id.*; see also *Menefee v. Schurr*, 751 N.E.2d 757, 760-61 (Ind. Ct. App. 2001) (discussing the Direct Action Rule).

93. *Estep*, 873 N.E.2d at 1026 (quoting *Menefee*, 751 N.E.2d at 760).

94. *Id.* at 1027.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.* at 1027-28.

99. *Id.* at 1025 ("The common law in most states today, including Indiana, teaches that any choice in action that survives the death of the assignor may be assigned.").

they could lead to the practical problems that the court outlined.¹⁰⁰ It will be interesting to see if this issue is revisited at some point in the future.

D. Comparison of Underinsured Motorist Coverage Limits to Tortfeasor's Bodily Injury Liability Limits Results in Finding of No Coverage

The decision in *Progressive Halcyon Insurance Co. v. Petty*¹⁰¹ offers a good analysis of how courts compare limits of a tortfeasor's liability coverage with an insured's policy to determine if underinsured motorist (UIM) coverage applies. Autumn Petty (Autumn) was driving a vehicle along the interstate with her brother, Michael Petty (Michael), as a passenger.¹⁰² Another motorist, Sears, crossed the median of the interstate, and collided with Autumn's vehicle, causing personal injuries to both Autumn and Michael.¹⁰³ Autumn filed a lawsuit against Sears and her UIM insurer, Progressive, to recover for personal injuries from the accident.¹⁰⁴ Michael, also a party to the lawsuit, similarly made a claim against Sears and Progressive.¹⁰⁵

Sears possessed a liability insurance policy that provided limits of \$50,000 per person and \$50,000 per accident.¹⁰⁶ The Progressive policy contained UIM limits of \$50,000 per person and \$50,000 per accident.¹⁰⁷ Sears' insurer interpleaded its full limits of \$50,000 into the court in exchange for release of all claims against Sears.¹⁰⁸ Autumn and Michael agreed to divide Sears' limits, with Autumn receiving \$15,000 and Michael receiving \$35,000.¹⁰⁹

In response to Autumn's and Michael's UIM claim, Progressive contended that no coverage was available.¹¹⁰ Relying upon a number of recent appellate decisions,¹¹¹ Progressive argued that because the UIM "per accident" limits of Autumn's policy were identical to Sears' bodily injury liability limits, Sears was not an UIM under its policy.¹¹²

100. *See id.* at 1027-28.

101. 883 N.E.2d 854 (Ind. Ct. App.), *trans. denied*, 898 N.E.2d 1217 (Ind. 2008).

102. *Id.* at 855.

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.* at 856.

111. For the cases Progressive relied on, see *Auto-Owners Insurance Co. v. Eakle*, 869 N.E.2d 1244 (Ind. Ct. App. 2007), *trans. denied*, 878 N.E.2d 218 (Ind. 2008); *Grange Insurance Co. v. Graham*, 843 N.E.2d 597 (Ind. Ct. App. 2006); *Allstate Insurance Co. v. Sanders*, 644 N.E.2d 884 (Ind. Ct. App. 1994).

112. *Petty*, 883 N.E.2d at 855; *see* IND. CODE § 27-7-5-4(b) (2004) (defining "underinsured motor vehicle" as including "an insured motor vehicle where the limits of coverage available for payment to the insured under all bodily injury liability policies covering persons liable to the

The trial court granted Autumn's and Michael's Motions for Summary Judgment, and denied Progressive's Motion for Summary Judgment.¹¹³ However, on appeal, the appellate court reversed, holding that summary judgment should be granted to Progressive.¹¹⁴

In concluding that no UIM coverage was available, the court compared the per accident limits of Sears' liability policy with the Progressive UIM limits.¹¹⁵ Because Autumn and Michael recovered the same total amount as they would recover if Sears was uninsured—\$50,000—Sears did not meet the definition of UIM.¹¹⁶ According to the court, if the per accident limits are identical, then no UIM exposure remains.¹¹⁷

The court also rejected Michael's argument that because he and Autumn individually received less than \$50,000 per person, they received less than the minimum per person limits of the UIM coverage as required by Indiana law,¹¹⁸ and thus, Sears should be considered an UIM.¹¹⁹ The court found that the statute's reference to \$50,000 was a "*per accident*," rather than a "*per person*" minimum coverage requirement.¹²⁰ The court also determined that insureds may not trigger UIM coverage by agreeing to accept a figure from the tortfeasor that may be less than the per person or per accident limits.¹²¹

II. COMMERCIAL CASES

A. *Court Allows Insurance Company to Take Multiple Examinations Under Oath of Insured*

In *National Athletic Sportswear, Inc. v. Westfield Insurance Co.*,¹²² the insured sustained a loss when an intruder broke into its building and stole business equipment.¹²³ The insured submitted a claim to its insurer, Westfield Insurance Company (Westfield), who sought to examine an insured's representative about the loss.¹²⁴

insured are less than the limits for the insured's underinsured motorist coverage at the time of the accident").

113. *Petty*, 883 N.E.2d at 856.

114. *Id.* at 865.

115. *Id.* at 863.

116. *Id.*

117. *Id.* at 858-59.

118. *See* IND. CODE § 27-7-5-2(a) (2004).

119. *Petty*, 883 N.E.2d at 863-65 (rejecting Michael's argument). Michael's brief cited Indiana Code section 27-7-5-2(a) in support of his assertion. *See id.* at 863.

120. *Id.* at 864.

121. *Id.*

122. 528 F.3d 508 (7th Cir. 2008).

123. *Id.* at 513.

124. *Id.*

The examination of the insured's owner lasted seven to eight hours.¹²⁵ After the examination, Westfield's attorney sent a letter to the insured's attorney requesting copies of certain documents and indicating that a second examination would need to be scheduled after receipt of the documentation.¹²⁶ The insured supplied a large number of documents to satisfy Westfield's document request.¹²⁷

The insured obtained new counsel who notified Westfield's attorney that the owner of the insured would not be made available for a second examination by Westfield's attorney.¹²⁸ The insured claimed that it had cooperated with Westfield by giving the long first examination and supplying the documents that Westfield requested.¹²⁹ Westfield's attorney responded by referencing the policy, which authorized Westfield to undertake the examinations.¹³⁰ The insured filed a lawsuit against Westfield, and the parties continued to dispute whether Westfield was permitted to conduct a second examination of the insured's owner.¹³¹

The district court concluded that the insured's refusal to be available for a second examination constituted a breach of the insurance policy.¹³² As a result, the district court granted Westfield's Motion for Summary Judgment.¹³³ While the court agreed with the insured's argument that, as a matter of contract, a "reasonableness" element existed in determining the length and number of examinations that an insurer could conduct, the court held that a second examination following the initial lengthy examination was not unreasonable.¹³⁴ While the court observed that an insurer cannot harass an insured by use of the examination, the court also observed that the policy granted a great amount of latitude to an insurer in the scope and length of the examinations.¹³⁵

The Seventh Circuit Court of Appeals completely adopted the district court's opinion.¹³⁶ This decision is very helpful to practitioners who conduct examinations under oath. The decision offers support to insurers to extensively question insureds on suspicious claims.¹³⁷ Insureds may face long and multiple

125. *Id.* at 514.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.* The policy language provided that Westfield "may examine any insured under oath, while not in the presence of any other insured and at such times as may be reasonably required, about any matter relating to this insurance or the claim, including an insured's books and records." *Id.* at 513.

131. *Id.* at 511.

132. *Id.* at 522.

133. *Id.* at 524. The court also granted Westfield summary judgment on the insured's claim for breach of duty of good faith. *Id.*

134. *Id.* at 519-21.

135. *Id.* at 522.

136. *Id.* at 510.

137. *See id.* at 522.

exams in complicated cases, and this case permits insurers to proceed pursuant to the insurance policy.¹³⁸

B. Court Narrowly Interprets Lease Clause Requiring Tenant to Insured/Landlord for Personal Injury Events

*Liberty Mutual Insurance Co. v. Michigan Mutual Insurance Co.*¹³⁹ addressed a common occurrence in landlord/tenant lease agreements. Duke Realty Corporation (Duke) was a landlord at a commercial business complex, renting space to its tenant, Trilithic, Inc. (Trilithic).¹⁴⁰ Pursuant to the lease agreement, Duke retained responsibility for snow and ice removal from common areas, including a pathway from Trilithic's employee parking lot.¹⁴¹ A Trilithic employee sustained personal injuries when she slipped on snow and ice while walking along this pathway on her way to work at Trilithic.¹⁴²

The employee sued Duke to recover for her personal injuries.¹⁴³ Under the lease, Trilithic was required to obtain liability insurance to cover both it and Duke from public liability and property damage.¹⁴⁴ Trilithic purchased a liability policy from Michigan Mutual Insurance Company (Michigan), which included an additional insured endorsement naming Duke as an additional insured with the following pertinent language: "WHO IS AN INSURED (Section II) is amended to include as an insured the person or organization shown in the Schedule but only with respect to liability arising out of the ownership, maintenance or use of that part of the premises leased to you and shown in the Schedule."¹⁴⁵

Pursuant to this provision, Duke tendered the defense and indemnity obligation for the employee's lawsuit to Michigan, who rejected the tender.¹⁴⁶ Duke's own liability insurer, Liberty Mutual Insurance Company (Liberty), provided a defense, and eventually settled the employee's lawsuit.¹⁴⁷ Liberty brought a lawsuit against Michigan to recover its cost for the defense and indemnity afforded to Duke, and Michigan counterclaimed to establish that no coverage was owed.¹⁴⁸ Eventually, Michigan received summary judgment from the trial court, which established that no coverage was owed to Duke, and an

138. *See id.* at 522-24.

139. 891 N.E.2d 99 (Ind. Ct. App. 2008)

140. *Id.* at 100.

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.* at 100-01.

148. *Id.* at 101. Specifically, Duke brought an action against Mutual, but Michigan requested that the trial court substitute Liberty for Duke as the real party in interest. *Id.* Duke's counsel acknowledged that Liberty was the proper subrogee of Duke. *Id.* Therefore, the trial court granted Michigan's request to substitute liberty for Duke. *Id.*

appeal ensued.¹⁴⁹

Liberty argued that although the fall occurred outside of the premises leased to Trilithic, Duke's liability still arose out of Trilithic's use of the leased premises as the injured employee was reporting to work when the accident happened.¹⁵⁰ The Indiana Court of Appeals disagreed with this broad interpretation of the "arising out of" language of the additional insured endorsement.¹⁵¹ Instead, the court held that in order for coverage to be triggered under the additional insured endorsement, "more than an incidental connection with the leased premises" was necessary.¹⁵² Because the employee's fall did not happen on a part of the leased premises, the court found that the connection between the accident and the leased premises was insufficient to support a finding of coverage.¹⁵³

This decision involves a very narrow interpretation of the "arising out of" language in many insurance policies. The court clearly believed that the fact the employee was on her way to work at the time of the accident was only an "isolated connection" and insufficient to find coverage.¹⁵⁴

C. Supreme Court Determines that Statute of Limitations for Alleged Insurance Agent Negligence Occurs When Insured Could Have Discovered Omission in Coverage Through Ordinary Diligence

In *Filip v. Block*,¹⁵⁵ the Indiana Supreme Court offered very instructive guidance on the accrual date for the running of the statute of limitations on negligence claims against insurance agents. The insureds purchased an apartment building in 1998.¹⁵⁶ In 1999, they met with an insurance agent who had served as agent for the previous owner.¹⁵⁷ The insureds requested that the agent provide "the same coverage" as the previous owner possessed, and the agent arranged a commercial general liability policy with similar coverage as possessed by the previous owner.¹⁵⁸

The insureds moved into one of the apartment units and rented out the others.¹⁵⁹ The agent apparently knew that the insureds were living in the apartment building; however, the agent did not provide coverage for the insureds' personal property, nor did she acquire a separate tenant's policy for the

149. *Id.*

150. *Id.* at 103.

151. *Id.* at 103-05.

152. *Id.* at 104.

153. *Id.* at 105.

154. *Id.*

155. 879 N.E.2d 1076 (Ind. 2008), *reh'g denied*.

156. *Id.* at 1078-79.

157. *Id.* at 1079.

158. *Id.*

159. *Id.*

insureds.¹⁶⁰ The insureds contended that the agent told them that they would “be covered” for losses.¹⁶¹ The insureds also made a number of changes to the policy after its inception due to change in circumstances.¹⁶²

In 2003, a fire destroyed the apartment building and the insured’s personal property.¹⁶³ At that point, the insureds contended that they first discovered their uninsured exposure for their personal property when the insurance company denied coverage.¹⁶⁴ The insureds filed suit against the agent.¹⁶⁵ The agent responded to the complaint and filed a motion for summary judgment, which the trial court granted on the basis that the two year statute of limitations barred the complaint.¹⁶⁶

The supreme court observed four possible dates that the statute of limitations period could begin—“the date of coverage, the date of the loss, the date of the [insurance company’s] denial of the claim, [or] the date the insured learn[ed] or should in the exercise of reasonable care have learned of the coverage problems.”¹⁶⁷ The court concluded that the insureds’ claim for the agent’s alleged negligent procurement of the wrong insurance coverage accrued at the time the policy was issued as the failure to provide correct insurance was discoverable through the exercise of ordinary diligence.¹⁶⁸

The court rejected the insureds’ argument that they were unaware of the lack of insurance until the actual loss occurred.¹⁶⁹ The court succinctly observed:

[I]nsurance is about the shifting of risk. The [insureds] bore the risk of loss from the date the policy was issued, so their injury from the alleged negligence occurred at this point. Although the extent of damages was unknown within the statute of limitations, the full extent of damages need not be known to give rise to a cause of action Presumably, no litigation would have been necessary to correct their policy and pay the adjusted premium for the desired coverage before the fire, but if for any reason the coverage was no longer available the [insureds] could have asserted their negligence claim if they felt that necessary. Further, if we accept the [insureds’] argument, then insureds become free riders, paying lower premiums, perhaps for many years, and then retaining the ability

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.* Interestingly, the opinion is silent on the exact date the lawsuit was filed. It appears it was filed within two years of the date of loss, but over two years from the date of the policy’s inception.

166. *Id.*; see IND. CODE § 34-11-2-4 (2008) (providing the requisite two-year limitation period).

167. *Filip*, 879 N.E.2d at 1082.

168. *Id.*

169. *Id.* at 1083-84

to claim the benefit of higher coverage if a loss is incurred.¹⁷⁰

Because the agent's alleged failure to insure could have been discovered by the insured from a review of the policy, the court concluded that the statute of limitations began to accrue when the policy was issued.¹⁷¹ As a result, the agent was entitled to summary judgment as the insureds' claim was time-barred.¹⁷² This decision is helpful to practitioners in providing a clearer understanding of the date for the beginning of the running of a statute of limitations for alleged insurance agent negligence claims.

170. *Id.* (citation omitted).

171. *Id.* at 1084.

172. *Id.* The court also addressed the appropriate manner for parties to provide evidence designation in briefing motions for summary judgment. *Id.* at 1080. Specifically, the court held that a party is free to designate evidence in the party's motion, memorandum of law, a separate filing or by appendix so long as it is done consistently. *Id.* at 1081.

RECENT DEVELOPMENTS IN INTELLECTUAL PROPERTY LAW

CHRISTOPHER A. BROWN*

In the relevant time-frame, federal and state courts issued several opinions affecting various parts of intellectual property law. Cases concerning fee-shifting in copyright litigation, the extent of patent misuse and exhaustion doctrines, analysis of noncompetition agreements under Indiana law, and trademark analysis under Seventh Circuit jurisprudence are among the cases reviewed below.

I. *QUANTA COMPUTER, INC. v. LG ELECTRONICS, INC.*¹

In this opinion, the U.S. Supreme Court considered the “longstanding doctrine of patent exhaustion”² in the context of patented methods involving computer technology. The opinion overturns a Federal Circuit opinion on two points, holding (1) that the doctrine applies to method patents and (2) that the appellate court’s view of a license agreement was incorrect, resulting in exhaustion of the patent rights at issue.³

Patent exhaustion refers to the concept that once a patented item has been sold by or under the authorization of the patent owner, any patent rights (i.e. the right to exclude others from making, using, selling, offering for sale, or importing) are exhausted *for that item*.⁴ Once the patent owner has given consent for that specific item, or has received payment from its sale, then it has passed out of the exclusionary rights embodied by the patent.⁵ To use a particular example, the sale by Camera Corporation of one of its patented cameras means that it cannot thereafter prevent others from using or selling that particular camera. The Court gave a brief history of the doctrine and ended by citing its case that held that an exhaustion exists “following the sale of an item . . . when the item sufficiently embodies the patent—even if it does not completely practice the patent—such that its only and intended use is to be finished under the terms of the patent.”⁶

In the *Quanta* case, respondent LG Electronics (LG) licensed a set of patents to Intel Corporation (Intel), permitting Intel to “make, use, sell (directly or indirectly), offer to sell, import or otherwise dispose of” products that practice technology in the licensed patents.⁷ A limitation in the license stipulated that no

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1. 128 S. Ct. 2109 (2008).

2. *Id.* at 2115.

3. *Id.* at 2113, 2117, 2121-22.

4. *Id.* at 2115.

5. *See id.* at 2118. “[W]hen a patented item is ‘once lawfully made and sold, there is no restriction on [its] use.’” (quoting *Adams v. Burke*, 84 U.S. 453, 457 (1873)).

6. *Id.* at 2117.

7. *Id.* at 2114.

license was granted to third parties for a combination of a product covered by the license and other items acquired from other sources.⁸ In other words, the parties wanted to keep any sale of additional components to be combined with the licensed products among themselves. Nonetheless, the license also mentioned that it would not “alter the effect of patent exhaustion that would otherwise apply” to sale of the licensed products.⁹ Intel agreed in a separate document that it would notify its customers that a license did not extend to a combination of a licensed product and a non-Intel product.¹⁰

When Quanta Computer (Quanta) purchased Intel products, with the notice from Intel about license limits, and combined them with other devices so as to be within the coverage of LG’s patents, LG sued.¹¹ The district court initially granted summary judgment to Quanta based on patent exhaustion.¹² It found that the products Intel sold Quanta (legitimately under the LG license) had “no reasonable non-infringing use,” so that Intel’s proper sale of them used up LG’s right of exclusion under the patents.¹³ A later order limited the summary judgment to apparatus claims, and held that patent exhaustion did not apply to process claims.¹⁴ On appeal, the Federal Circuit agreed that the exhaustion doctrine did not apply to processes, but also held that the LG/Intel license did not allow Intel to sell its products to Quanta for use with non-Intel devices.¹⁵

After reviewing the naissance of the concept of patent exhaustion, the Court repeated the basic rule of the doctrine: “[T]he right to vend [the patented item] is exhausted by a single, unconditional sale, the article sold being thereby carried outside the monopoly of the patent law and rendered free of every restriction which the vendor may attempt to put upon it.”¹⁶ It further noted the 1942 opinion in *United States v. Univis Lens Co.*,¹⁷ an antitrust case that somewhat broadened the rule.¹⁸ In *Univis*, Univis licensed another company to make eyeglass-lens blanks and to sell those blanks at a fixed price to others for finishing into lenses covered by Univis patents.¹⁹ Even though the patent claims for finished lenses were practiced in part by Univis licensees, the Court held that exhaustion applied to the sale of the blanks:

[W]here one has sold an uncompleted article which, because it embodies

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.* at 2114-15.

13. *Id.* at 2115.

14. *Id.*

15. *Id.*

16. *Id.* at 2116 (quoting *Motion Picture Patents Co. v. Universal Film Mfg. Co.*, 243 U.S. 502, 516 (1917)).

17. 316 U.S. 241 (1942).

18. *Quanta*, 128 S. Ct. at 2116-17.

19. *Univis*, 316 U.S. at 243-44.

essential features of his patented invention, is within the protection of his patent, and has destined the article to be finished by the purchaser in conformity to the patent, he has sold his invention so far as it is or may be embodied in that particular article.²⁰

Thus, exhaustion can apply if a patent owner sells a product which is not itself covered by the patent, when the “only and intended use” of such product is to be finished and, thereby, come within the patent’s claims.²¹

As to whether the exhaustion doctrine applied to method claims at all, the Court found no reason not to apply the doctrine.²² Even though methods cannot be sold in the way products or devices can, there is precedent for exhausting method patents via the sale of something that “embodied” the method.²³ Further, a blanket rule keeping method claims out of the reach of the doctrine would provide a back door to keep apparatus away from exhaustion, insofar as most or all patents could include a claim to a method with the device.²⁴

Having determined that exhaustion could apply to method claims, the Court turned to the parameters of applying it. Following *Univis*, the Court first discussed whether the Intel products at issue were capable only of use in practicing the patent.²⁵ No reasonable use for the products outside of combination into something that would practice LG’s patented subject matter was of record, and the goal of Intel’s sales to Quanta appeared to be Quanta’s use in computers that would practice that subject matter.²⁶ The Court also considered whether Intel’s products included essential features of the patented invention and concluded that they do and, in fact, “all but completely practice the patent.”²⁷

The Court reviewed LG’s arguments attempting to distinguish *Univis* but rejected them.²⁸ Notably, LG’s position that exhaustion of one patent does not indicate exhaustion of another generally found agreement with the Court.²⁹ However, the Court then noted that a device that practices one patent “*while substantially embodying*” another patent suggests that both patents’ rights could be exhausted by the sale of the device.³⁰ “The relevant consideration is whether the Intel Products that partially practice a patent—by, for example, embodying its essential features—exhaust *that* patent.”³¹

Exhaustion arises from an authorized sale, and so the Court turned to the

20. *Id.* at 250-51.

21. *Quanta*, 128 S. Ct. at 2117.

22. *Id.*

23. *Id.*

24. *Id.* at 2117-18.

25. *Id.* at 2118.

26. *Id.* at 2118-21.

27. *Id.* at 2120.

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.* at 2121.

license itself to see if Intel's sale to Quanta was properly authorized. Because the license itself permitted Intel to make, use, and sell products covered by LG's patents, and the notice provision was not breached by Intel or a condition of the license, Intel's sales to Quanta were within the license.³² Indeed, the Court noted that "[n]o conditions limited Intel's authority to sell products substantially embodying the patents" at issue.³³ The argument that Quanta had no "implied license" to use Intel's products as it did had no bearing because exhaustion was the issue, not any theory of license to Quanta.³⁴ In the end, the Court held that LG could not assert its patent rights against Quanta and reversed the Federal Circuit.³⁵

There are two items of principal interest in this opinion. First, the Court has removed any doubt as to whether the exhaustion doctrine applies to patent rights for processes or methods.³⁶ Even so, it would appear in most cases that the doctrine will not often arise outside of the context of some product or device. The nature of methods simply does not permit one to trace a particular method in commerce, unlike individual articles, which can be traced. Nonetheless, it is clear that in an appropriate case, the sale of a product or composition of matter could exhaust not only a claim to that apparatus or composition, but also a claim to the methods involved.³⁷

Second, whether a sale can exhaust a product patent claim or a method patent claim is not a mutually-exclusive question. The Court clearly rejected the idea that exhaustion based on the sale of one product can only affect one patent.³⁸ With the formulation of the exhaustion doctrine given in *LG*, it is possible for the sale of a product plainly within the apparatus claims of one patent to exhaust method claims of another patent, so long as the product has no reasonable other use than in such methods and it has essential feature(s) of the method. Patent practitioners recognize the commonness of prosecuting claims to a device itself in one patent application and claims to a method of making or using that or a similar device in another. While the hurdle of "no reasonable other use" may be quite a high bar to clear, a strategy of separating method from device both in patents and in licensing may backfire on the patent owner unless thought through very carefully. Similarly, a licensee or its customers may have an exhaustion defense against multiple patents, even though a license refers only to one patent.

32. *Id.* at 2121-22.

33. *Id.* at 2122.

34. *Id.*

35. *Id.*

36. *Id.* at 2118 (rejecting the argument "that method claims, as a category, are never exhaustible").

37. *See id.* (noting that methods claims "as a *category*" are not excluded) (emphasis added).

38. *Id.* at 2120-21.

II. *TOP TOBACCO, L.P. v. NORTH ATLANTIC OPERATING CO.*³⁹

Although this case does not provide a great deal of substantive trademark law for Indiana and Seventh Circuit practitioners, it is interesting at least for its common-sense approach and discussion by Chief Judge Easterbrook. Top Tobacco sued North Atlantic and National Tobacco Co. for infringement of its registered trademark “TOP” as used on loose or “roll-your-own” tobacco.⁴⁰ Following a summary judgment in the defendants’ favor, Top Tobacco appealed.⁴¹

The first line of the opinion sets the tone and perhaps provides an overarching principle for deciding whether a trademark lawsuit is warranted: “This case illustrates the power of pictures. One glance is enough to decide the appeal.”⁴² In fact, there is little more analysis in the opinion, and one wonders whether a request for attorney fees and/or Rule 11-type sanctions would have been granted.⁴³

Essentially, the opinion gives pictures of the accused product’s labeling and that of the plaintiff’s product’s labeling and finds it “next to impossible to believe that any consumer, however careless, would confuse these products.”⁴⁴ The court adverted to the lack of evidence from the plaintiff, such as a survey or customer affidavits in noting that “the pictures are all we have.”⁴⁵ Focusing on that lack of evidence, the opinion accused Top Tobacco of asking the court “to ignore the pictures and the lack of any reason to believe that anyone ever has been befuddled.”⁴⁶ The court noted the multi-factor test for likelihood of confusion given in prior cases and gives examples of such factors.⁴⁷ In the end, however, the court effectively passed over the factors: “A list of factors designed as *proxies* for the likelihood of confusion can’t supersede the statutory inquiry. If we know for sure that consumers are not confused about a product’s origin, there is no need to consult even a single proxy.”⁴⁸ Thus, absent significant evidence—such as surveys or affidavits—and absent an analysis of traditional confusion-related factors, the comparison of the products as they are actually sold was sufficient for the court to reach the ultimate legal conclusion of no likelihood of confusion.⁴⁹

This was certainly an efficient (and to this author’s mind, correct) resolution of the case. Perhaps this case is the exception that proves the rule, as the one

39. 509 F.3d 380 (7th Cir. 2007).
40. *Id.* at 381.
41. *Id.* at 382-83.
42. *Id.* at 381.
43. *See* FED. R. CIV. P. 11(c) (providing sanctions for pleading violations).
44. *Top Tobacco*, 509 F.3d at 382-83.
45. *Id.* at 383.
46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.*

case that is so clear that significant analysis is unnecessary. If so, the court might have levied sanctions on the plaintiff or at least provided a sentence or two of caution as a “word to the wise” for other attorneys.

On the other hand, the opinion seems to move too quickly past the fundamentals of the federal trademark statute. It is granted that the labels of the respective products are quite different, and the defendants use of the word “top” was arguably descriptive.⁵⁰ Nevertheless, infringement of a federally-registered trademark is not limited to a side-by-side comparison. Rather, the statute provides liability for unauthorized use in commerce of “[a]ny reproduction, counterfeit, copy, or colorable imitation of a registered mark in connection with the sale, offering for sale, distribution, or advertising of any goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive.”⁵¹ A comparison of how the alleged infringer uses a word or phrase with how the mark’s owner uses it is not the test set forth in the statute. Rather, the alleged infringer’s actual use is compared to the registration to see whether the use is “likely to cause confusion.”⁵²

Further, there are numerous cases which advise to consider marks “in light of what happens in the marketplace,” not “merely by looking at the two marks side-by-side.”⁵³ To depend so heavily on a side-by-side comparison in this case seems to undercut the directions in these earlier opinions not to rely on such comparisons. In that light, the lack of evidence proffered by the plaintiff to support its claims is particularly important. Had the plaintiff provided significant evidence, then a broader analysis of the likelihood of confusion might have been necessary. Perhaps the lesson is that the registration itself can only get the plaintiff so far, even though it is evidence of the plaintiff’s usage and its rights. Without further evidence as to the market and usages of the respective marks to back up the registration, the thousand words provided by a picture alone could flatten a case from the start.

III. *AUTOZONE, INC. V. STRICK*⁵⁴

In contrast to the *Top Tobacco* opinion noted above,⁵⁵ in *Strick*, the Seventh Circuit reversed a summary judgment granted in favor of a trademark defendant.⁵⁶ Plaintiff AutoZone is a national retailer of automotive products, but AutoZone does not provide automobile maintenance or repair services.⁵⁷ The

50. See *id.* at 381 (noting that “top” has any number of meanings including to “mean the best”).

51. 15 U.S.C. § 1114(1)(a) (2006).

52. *Id.*

53. See, e.g., *Ty, Inc. v. Jones Group, Inc.*, 237 F.3d 891, 898-99 (7th Cir. 2001) (internal quotation omitted).

54. 543 F.3d 923 (7th Cir. 2008).

55. See *supra* Part II.

56. *Strick*, 543 F.3d at 926.

57. *Id.*

record also showed that AutoZone had used its “AutoZone” trademark across the country since 1987 and had made substantial marketing and advertising efforts in the Chicago area from at least the mid-1990s.⁵⁸ Strick opened two businesses in that geographic area under the names of “Oil Zone” and “Wash Zone,” which provided maintenance services such as quick oil changes and car washes.⁵⁹

While AutoZone became aware of and investigated Strick’s businesses in late 1998, AutoZone took no action until it contacted Strick in early 2003; it then filed suit under federal and state theories in November 2003.⁶⁰ In a summary judgment motion, Strick asked for judgment based on a lack of a likelihood of confusion and on AutoZone’s four-year delay in filing suit—laches.⁶¹ The district court granted the motion, finding that the marks were “not similar enough” for a trier of fact to find a likelihood of confusion, but the court did not reach the laches issue.⁶²

Writing for his co-panelists, Judges Ripple and Tinder, Judge Manion first restated the seven factors considered in this circuit in a determination of whether confusion is likely:

- (1) the similarity between the marks in appearance and suggestion; (2) the similarity of the products; (3) the area and manner of concurrent use; (4) the degree and care likely to be exercised by consumers; (5) the strength of the plaintiff’s mark; (6) any actual confusion; and (7) the intent of the defendant to “palm off” his product as that of another.⁶³

While the similarity of the marks, the intent of the defendant and any actual confusion are “usually . . . particularly important,” the weight of each factor may vary according to the facts of record.⁶⁴ As a question of fact, the likelihood of confusion issue can be determined summarily “‘if the evidence is so one-sided that there can be no doubt’” of the answer.⁶⁵

The opinion went on to discuss each of the factors except for actual confusion.⁶⁶ As to the marks themselves, the court considered the “prominent similarities” between them—namely, the presence of “zone,” and the size, font and slant patterns within each mark—“may very well lead a consumer” to believe

58. *Id.* at 927.

59. *Id.*

60. *Id.* at 928.

61. *Id.*

62. *Id.* at 928-29.

63. *Id.* at 929.

64. *Id.*; see also *supra* Part II (discussing the *Top Tobacco* case). The overall question is confusion in the marketplace, and so it is the factor(s) addressing most directly that question that are most important. See *Strick*, 543 F.3d at 929 (noting that confusion “is ultimately a question of fact”).

65. *Strick*, 543 F.3d at 929 (quoting *Packman v. Chi. Trib. Co.*, 267 F.3d 628, 637 (7th Cir. 2001)).

66. *Id.* at 929-34.

that “Oil Zone” and “Wash Zone” could be AutoZone-affiliated businesses.⁶⁷ The court distinguished *AutoZone Inc. v. Tandy Corp.*,⁶⁸ concerning “AutoZone” and Radio Shack’s use of POWERZONE,⁶⁹ in which the Sixth Circuit found the marks not likely to be confused at least in part based on features and uses of the marks in addition to the difference between “power” and “auto” in them.⁷⁰ In *Strick*, the court saw such features and uses as being potential similarities, rather than the differences noted in the Sixth Circuit opinion, leaving open questions for a finder of fact.⁷¹

Similarly, the court decided that a reasonable consumer might believe that Oil Zone or Wash Zone are “spinoffs” of AutoZone based on a relationship between oil change or car wash services and products used in changing oil or washing cars.⁷² The Sixth Circuit’s decision in *Tandy Corp.* was also less relevant in this context because the record showed hardly any overlap in the kinds of products sold, and so customers looking for one type of product were unlikely to go to the other store in search of it.⁷³

The court also concluded that a fact-finder could see commonalities in geographic usage and customer base, that the degree of care exercised by consumers might be relatively low, and that the strength of AutoZone’s mark was significant.⁷⁴ The court further noted Strick’s experience in his industry and the possibility of inferring an intent by the defendant to confuse consumers as to the similarity between the marks where one has “attained great notoriety.”⁷⁵ All of these factors could be applied in the plaintiff’s favor, said the court, further leading away from summary judgment.⁷⁶

This case is not especially notable for particular pronouncements of law or treatment of a case, except in comparison with the relative abruptness of the *Top Tobacco* opinion. *AutoZone* conveys a much more usual, or standard, way of analyzing a trademark case, albeit in the context of a summary judgment motion. The court considered the “likelihood of confusion” question indirectly by analyzing the seven listed factors against the background of actual market conditions and consumer behavior.⁷⁷ The conclusions drawn from those factors lead to the legal conclusion of whether confusion is likely. *Top Tobacco* starts with the same question—whether a likelihood of confusion exists—but suggests that in some cases that question can essentially be directly answered.⁷⁸ In a broad

67. *Id.* at 930.

68. 2004 FED App. 0200P, 373 F.3d 786 (6th Cir.).

69. *Strick*, 543 F.3d at 930-31.

70. *Tandy Corp.*, 373 F.3d at 796.

71. *Strick*, 543 F.3d at 931.

72. *Id.*

73. *Id.* at 932.

74. *Id.* at 932-33.

75. *Id.* at 934.

76. *Id.* at 935.

77. *See id.* at 929-34.

78. *Top Tobacco, L.P. v. N. Atl. Operating Co.*, 509 F.3d 380, 381-83 (7th Cir. 2007).

sense, the opinion provided that two trademarks can be so different (or perhaps so similar) in the context of the actual marketplace that the likelihood of confusion is immediately determinable.⁷⁹ Of course, the context of *Top Tobacco* also included products and consumer groups that were identical,⁸⁰ and so perhaps a more traditional factor analysis was implicitly performed in that case. A practitioner should prepare his or her trademark case with all of the appropriate Seventh Circuit factors for likelihood of confusion in mind. Nevertheless, *Top Tobacco* suggests that a proper case will permit “short-circuiting” an indirect approach in favor of a direct consideration of whether confusion is likely.

IV. *COUNTY MATERIALS CORP. V. ALLAN BLOCK CORP.*⁸¹

In this opinion, the Seventh Circuit Court of Appeals found itself at the intersection of the law of patent misuse and a covenant not to compete.⁸² The parties’ dispute centered on a production agreement in which County Materials Corporation (County) was authorized to manufacture Allan Block Corporation’s (Allan) patented concrete block, and in which County agreed not to sell competing products for a period after expiration of the agreement or if County stopped making the patented product.⁸³ Despite that language, after the agreement was terminated County did not wait the required period before offering a competing and non-infringing product.⁸⁴

County took the position that the covenant not to compete was against the policy of the patent laws. It termed the inclusion of the covenant in the agreement “misuse” by Allan.⁸⁵ In its view, Allan used leverage from its patent rights to obtain something to which it was not otherwise entitled, namely an eighteen-month freedom from competition against County concerning products not covered by Allan’s patent.⁸⁶ The district court granted summary judgment against County, and the Seventh Circuit affirmed on appeal.⁸⁷

Before it could attend to the substance of the appeal, the court explained why this dispute’s patent law-related issues were properly before the Seventh Circuit, and not before the Federal Circuit Court of Appeals. Federal Circuit jurisdiction obtains where “‘a well-pleaded complaint establishes either that federal patent law creates the cause of action or that the plaintiff’s right to relief necessarily depends on resolution of a substantial question of federal patent law, in that patent law is a necessary element of one of the well-pleaded claims.’”⁸⁸ The court

79. *Id.*

80. *See id.* at 382.

81. 502 F.3d 730 (7th Cir. 2007), *cert. denied*, 128 S. Ct. 1709 (2008).

82. *Id.* at 732-33.

83. *Id.* at 733.

84. *Id.*

85. *Id.*

86. *Id.* at 733, 735-37.

87. *Id.* at 732-33.

88. *Id.* at 733 (quoting *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 809

viewed the complaint as raising questions of enforceability of a license agreement,⁸⁹ and considered the case to parallel that of *Scheiber v. Dolby Laboratories, Inc.*⁹⁰ With that principal issue in mind, and jurisdiction over the case having apparently been based exclusively on diversity, the court determined that it had the proper appellate jurisdiction.⁹¹

On the merits, the court considered briefly whether the covenant might fit into a “per se” concept of misuse. The court noted that the infringement statute states that refusal to license a patent is not misuse, nor is conditioning a license on acquiring a license to another patent or buying a separate product, unless the patentee has market power.⁹² Other examples of “per se” misuse come from the common law, and include “arrangements in which a patentee effectively extends the term of its patent by requiring post-expiration royalties.”⁹³ In brushing past these legal standards, the court took the view that they exemplified the general disfavor or rejection of the view of patent misuse put forward by County.⁹⁴ The covenant not to compete did not reach these standards.⁹⁵

Beyond a “per se” view, the court looked to see whether the circumstances surrounding the covenant evidenced “the effect of extending the patentee’s statutory [patent] rights . . . with an anti-competitive effect.”⁹⁶ If so, then the court needed to conduct a rule of reason analysis to see if the covenant “imposes an unreasonable restraint on competition.”⁹⁷ After reviewing relevant authorities, the court reasoned that to get past summary judgment, “evidence tending to show an adverse effect in an economically sound relevant market is essential for [such a] . . . rule of reason”-based action.⁹⁸

The court saw no evidence of abuse by Allan in the agreement.⁹⁹ Rather, the court understood that the terms of the agreement gave County substantial benefits in exchange for royalties and efforts to exploit Allan’s patent.¹⁰⁰ In the court’s view, the value provided by Allan in terms of services could have sufficed for the covenant not to compete.¹⁰¹ The facts of record did not show that Allan “needed or used any kind of leverage made possible by the patent” to get the covenant.¹⁰² In fact, the court went on to opine that the covenant was not “particularly

(1988)).

89. *Id.* at 733-34.

90. 293 F.3d 1014 (7th Cir. 2002).

91. *County Materials*, 502 F.3d at 734 (citing 28 U.S.C. §§ 41, 1291 (2006)).

92. *Id.* at 734 (citing 35 U.S.C. § 271(d) (2006)).

93. *Id.* (quoting *Va. Panel Corp. v. MAC Panel Co.*, 133 F.3d 860, 869 (Fed. Cir. 1997)).

94. *Id.* at 734-35.

95. *Id.* at 735.

96. *Id.* (quoting *Va. Panel Corp.*, 133 F.3d at 869).

97. *Id.* (quoting *Va. Panel Corp.*, 133 F.3d at 869).

98. *Id.* at 736.

99. *Id.* at 736-37.

100. *Id.* at 737.

101. *Id.*

102. *Id.*

onerous.”¹⁰³ The consideration of the covenant itself and its minimal or non-existent effect on competition in the relevant market and geographical area further supported the court’s dismissal of the patent misuse defense.¹⁰⁴

This opinion, although not from the Federal Circuit, seems to confirm a general view that a misuse defense to a patent case will need a showing akin to an antitrust case. The easy scenario is where the patent owner has created a scheme to keep royalties flowing past the expiration of a patent. Otherwise, a misuse defense will require evidence of market power along with tying of another product to the patent rights, and/or evidence of a restraint on competition that is unreasonable in light of the conditions of the relevant market. It may be that the circumstances surrounding the negotiation or entering of a license are indicative of a degree of market power held by the patentee, but without some evidence of such power or an unreasonable restraining of a market, a patent misuse defense may not make it to trial.

V. *PATRIOT HOMES, INC. V. FOREST RIVER HOUSING, INC.*¹⁰⁵

In *Patriot Homes*, the Seventh Circuit Court of Appeals considered a preliminary injunction issued against Forest River Housing on issues of copyright and trademark infringement and trade secret misappropriation.¹⁰⁶ The suit arose out of allegations that Forest River’s subsidiary, Sterling, and a group of its employees—who formerly were Patriot Homes employees—had taken Patriot modular home designs.¹⁰⁷ Once Sterling distributed sales materials showing the designs, Patriot sued under a variety of theories.¹⁰⁸

Defending against a preliminary injunction motion, Sterling argued that all of the alleged confidential or trade secret information was in fact readily available or ascertainable, and thus, Sterling could properly use the information.¹⁰⁹ Specifically, Sterling noted that modular home manufacturers must submit a substantial range of information to state agencies in order to obtain approval for sale.¹¹⁰ After the preliminary injunction hearing, Sterling made Freedom of Information Act requests to three states for the documents submitted by Patriot as part of its approval submission, and in response the states sent thousands of documents, none of which were marked confidential.¹¹¹ While Patriot contended that all of that material was proprietary and confidential, Sterling maintained that only a relatively small amount of particular categories

103. *Id.*

104. *Id.*

105. 512 F.3d 412 (7th Cir. 2008).

106. *Id.* at 413.

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.* at 414.

111. *Id.*

of information was not in the materials obtained from the states.¹¹²

The district court issued a preliminary injunction broadly forbidding Sterling from actions with "Patriot's copyrights, confidential information, trade secrets, or computer files."¹¹³ While Sterling apparently did not object to a prohibition on use of computer files, it argued on appeal that the remainder of the injunction was too vague.¹¹⁴ The Seventh Circuit agreed.¹¹⁵

After discussing basic principles concerning vagueness of injunctions, the court rejected the injunction because it did not specify what was included in the "trade secrets" or "confidential information."¹¹⁶ The court noted that *American Can Co. v. Mansukhani*¹¹⁷ rejected an injunction entered "without determining whether the defendant's [products] were in fact substantially derived from plaintiff's trade secrets."¹¹⁸ The court flatly denied Patriot's argument that the court was not required to identify all elements of copyright originality or trade secret protection in the injunction.¹¹⁹ On the contrary, the court recognized difficulty in "ascertain[ing] what information is a trade secret or confidential at this stage of the proceedings, [but] the district court still must make this determination in order to clearly delineate Sterling's responsibilities pursuant to the injunction."¹²⁰

While at first glance this opinion would appear to place a relatively high burden on Seventh Circuit district courts in fashioning injunctions in a trade secret or similar case, this author takes the view that the determinations required are nothing more than the usual indication of whether a likelihood of success exists on the merits at trial. As part of any trade secret preliminary injunction proceeding, the plaintiff will have to provide sufficient evidence of: (1) the existence of a trade secret and (2) the misappropriation of it to establish a likelihood of success. If convinced of the likelihood that trade secrets exist and will be misappropriated, then the court can incorporate the definition of the trade secret material—at least that information demonstrated as likely to be a trade secret at a hearing—into the injunction. What this opinion most directly says is that in order to issue an injunction, the district court must at least make a concrete finding of whether particular information is likely to be a trade secret.¹²¹ Without a specification of what information the enjoined party cannot use, an injunction will be too vague.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.* at 416 (citing FED. R. CIV. P. 65(d)).

116. *Id.* at 415-16.

117. 742 F.2d 314 (7th Cir. 1984).

118. *Patriot Homes*, 512 F.3d at 415 (citing *American Can*, 742 F.2d at 326).

119. *Id.* (citing *American Can*, 742 F.2d at 332).

120. *Id.*

121. *See id.* at 415-16.

VI. *RIVIERA DISTRIBUTORS, INC. V. JONES*¹²²

This Seventh Circuit opinion examined an award of attorney fees in a copyright case.¹²³ Chief Judge Easterbrook’s opinion is short, but provides an eye-opening view of fee-shifting in the copyright context.

The federal Copyright Act provides that a court can “award a reasonable attorney’s fee to the prevailing party as part of the costs” of an action.¹²⁴ The “prevailing party” can be either plaintiff or defendant—no statutory presumption exists favoring one over the other.¹²⁵ Under Seventh Circuit precedent, “the prevailing party in copyright litigation is presumptively entitled to reimbursement of its attorneys’ fees.”¹²⁶

The question of what constitutes “prevailing” remains. Without question, a party who wins a verdict after trial is the prevailing party. In *Riviera*, however, the parties never went to trial.¹²⁷ Instead, the suit had been dismissed by *Riviera* well after the time had run for a voluntary dismissal without prejudice, with *Riviera* admitting that it could not prove its claim at that time.¹²⁸ The district court dismissed the case with prejudice.¹²⁹ The trial court rejected the defendants’ request for attorney’s fees, however, because in its view they had not prevailed on the merits.¹³⁰ Without findings concerning the underlying substance of the case, the district court did not believe the defendants to be entitled to “prevailing party status.”¹³¹

The Seventh Circuit rejected the view that whether one “prevails” depends on the content of a judge’s opinion.¹³² Instead, relying on Supreme Court precedent concerning other areas of law, the court considered that any judgment in a party’s favor brings about a “material alteration of the[ir] legal relationship,” and means that the party prevails.¹³³ Even in a consent judgment context, where the parties admit no liability and the judge makes no independent findings, a party still prevails, according the Seventh Circuit.¹³⁴ The fact that the judge made no findings did not make the defendants less of a prevailing party.¹³⁵ A “win” is all that is required to be given prevailing party status.

122. 517 F.3d 926 (7th Cir. 2008).

123. *Id.* at 927-28.

124. 17 U.S.C. § 505 (2006).

125. *Riviera Distribs.*, 517 F.3d at 928 (citing *Fogerty v. Fantasy, Inc.*, 510 U.S. 517 (1994)).

126. *Id.*

127. *Id.* at 927.

128. *Id.*

129. *Id.*

130. *Id.* at 928.

131. *Id.*

132. *Id.*

133. *Id.* (quoting *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep’t of Health & Human Res.*, 532 U.S. 598, 604 (2001)).

134. *Id.*

135. *Id.*

The court moved on to consider whether it was appropriate “not to honor the presumption that the prevailing party, plaintiff *or* defendant, recovers attorneys’ fees.”¹³⁶ The court identified three potential factors against honoring the presumption: (1) defendants’ failed motion to dismiss the complaint, (2) defendants’ abandonment of mediation, and (3) defendants’ delay in responding to discovery.¹³⁷ The court dismissed the first two factors, claiming that a failed motion to dismiss is a “common step” and “not a good reason” to withhold fees, and that a party is entitled to adjudication and is not required to mediate.¹³⁸ As to the last factor, the court considered that discovery delay might warrant a reduction, but not an elimination of fees for the prevailing party.¹³⁹

The court also considered the history between the parties. Given the acrimony between them, and the existence of a prior suit for substantially the same cause that was settled with an agreement to submit materials to an independent expert for analysis, the court found the case to be “an especially good candidate for fee shifting.”¹⁴⁰ While it was not clear as to whether the district court considered that expert-resolution agreement to be of consequence, the Seventh Circuit found it to be highly relevant.¹⁴¹ Referring to *Omni Tech Corp. v. MPC Solutions Sales, LLC*,¹⁴² the court stated that an agreement for alternative dispute resolution must be enforced if valid under appropriate state contract law.¹⁴³ The prior settlement provided for alternative resolution, and so plaintiffs in this case “came to the wrong forum.”¹⁴⁴ Defendants were forced to spend attorney’s fees despite the agreement to avoid them, and their win entitled them to those fees, including fees incurred on appeal.¹⁴⁵

VII. *EAGLE SERVICES CORP. V. H2O INDUSTRIAL SERVICES, INC.*¹⁴⁶

This case also concerned an award of attorneys’ fees in a copyright case won by a defendant.¹⁴⁷ After four of Eagle Services Corporation’s (Eagle) employees left to set up defendant H2O Industrial Services, Inc. (H2O), Eagle sued for infringement of copyright in its safety manual that the employees had taken with them.¹⁴⁸ Eagle verified that H2O had the manual and had made copies, but apparently, H2O later made its own manual, and no prospective customers other

136. *Id.*

137. *Id.* at 928-29.

138. *Id.* at 929.

139. *Id.*

140. *Id.*

141. *Id.*

142. 432 F.3d 797 (7th Cir. 2005)

143. *Riviera Distribs.*, 517 F.3d at 929.

144. *Id.*

145. *Id.* at 929-30.

146. 532 F.3d 620 (7th Cir. 2008).

147. *Id.* at 621.

148. *Id.* at 622.

than Eagle employees posing as customers had seen the copies.¹⁴⁹ Despite H2O apparently obtaining no business from or in the presence of the copies, Eagle claimed restitution of H2O’s profits made prior to creating its own manual, insofar as H2O could not provide services without a manual under applicable regulations.¹⁵⁰ Eagle admitted that statutory damages were not available.¹⁵¹

After Eagle presented its case, H2O won a motion for judgment for lack of evidence that the applicable regulations in fact required a manual.¹⁵² The district court did not award fees to the defendant, finding that Eagle’s suit was not frivolous or in bad faith, and further noted that “the standards for what the parties call an ‘indirect profits’ suit are vague.”¹⁵³

Judge Posner wrote that the district court was “wrong on all three counts, but even if it had been right it would not have been justified in refusing to award fees.”¹⁵⁴ The Seventh Circuit considered the suit frivolous not only because its theory was not borne out by the regulations it relied on, but also apparently because of the relative ease of the task of creating a manual.¹⁵⁵ Since Eagle was suing for damages, but had no ground for obtaining such a judgment, “the fact that his rights may have been violated does not save his suit from being adjudged frivolous.”¹⁵⁶

In light of that judgment, the court found H2O entitled to fees “[u]nder any standard we know for shifting attorney’s fees from a losing plaintiff to a winning defendant.”¹⁵⁷ The court noted that plaintiffs and defendants are to be treated alike in the copyright scheme of shifting fees, and repeated its view that the presumption for an award of fees is very strong in the case of a prevailing defendant.¹⁵⁸

The opinion took a moment to consider the Sixth Circuit’s view that a plaintiff’s presentation of “‘colorable, albeit meritless, claims’” do not entitle a defendant to an award of attorney fees.¹⁵⁹ The use of a standard akin to that of an employment discrimination case, in the Seventh Circuit’s view, misses special characteristics of a copyright or other intellectual property case.¹⁶⁰ In particular, the court noted that a successful defendant in most copyright cases enlarges the public domain (insofar as it is established that no copyright exists or rights are

149. *Id.*
150. *Id.*
151. *Id.*
152. *Id.*
153. *Id.* at 623.
154. *Id.*
155. *Id.* at 623-24.
156. *Id.* at 623.
157. *Id.* at 624.
158. *Id.*
159. *Id.* at 624-25 (quoting *Murray Hill Publ’ns, Inc. v. ABC Commc’ns, Inc.*, 2001 FED App. 0295P, 264 F.3d 622, 640 (6th Cir.)).
160. *Id.* at 625.

limited in some fashion) and, therefore, benefits the public.¹⁶¹ It is quite evident from both *Riviera Distributors* and *Eagle Services*, copyright fee-shifting cases, that a plaintiff in the Seventh Circuit should tread carefully, as a loss of any kind will put him or her on the defensive on the issue of attorney fees.

VIII. *AGS CAPITAL CORP. V. PRODUCT ACTION INTERNATIONAL, LLC*¹⁶²

This Indiana Court of Appeals opinion addresses a question of first impression—whether Indiana’s trade secret statute pre-empts a claim under the racketeer-influenced corrupt organizations (RICO) laws.¹⁶³ The opinion lists in great detail the actions of several individuals employed by defendant Fast Tek Group, LLC (Fast Tek) who obtained information from Product Action International (Product Action).¹⁶⁴ The information was useful to Fast Tek in getting up to speed and in competition quickly after the company’s formation.¹⁶⁵ As part of its suit, Product Action made claims under both Indiana’s enactment of the Uniform Trade Secrets Act, and under its RICO statute.¹⁶⁶ Fast Tek and the other appellants argued that the Trade Secrets Act, which “displaces all conflicting law of this state pertaining to the misappropriation of trade secrets, *except contract law and criminal law*,”¹⁶⁷ pre-empted application of RICO civil remedies in the present case.¹⁶⁸

The court looked first to *Infinity Products, Inc. v. Quandt*¹⁶⁹ for guidance on applying the pre-emption provision of the Trade Secret Act.¹⁷⁰ *Quandt* considered the common law concept of *respondeat superior* in connection with the requirement of the Act that a defendant know or have reason to know that a trade secret was acquired improperly.¹⁷¹ The *Quandt* court noted the legislative history of the pre-emption provision calling the Indiana provision “stronger” than a similar provision in the Uniform Trade Secrets Act in existence at the time the General Assembly adopted the provision.¹⁷² Nevertheless, while acknowledging the Act’s non-displacement of the criminal law, *Quandt* left open the question of whether civil remedies provisions arising from criminal acts were pre-empted.¹⁷³

The court of appeals tackled this question in *AGS* by focusing on the

161. *Id.*

162. 884 N.E.2d 294 (Ind. Ct. App.), *trans. denied*, 898 N.E.2d 1222 (Ind. 2008).

163. *Id.* at 306.

164. *Id.* at 300-03.

165. *Id.* at 299-303.

166. *Id.* at 299, 303.

167. *Id.* at 306 (quoting IND. CODE § 24-2-3-1(c) (2007)) (emphasis added) (footnote omitted).

168. *Id.*

169. 810 N.E.2d 1028 (Ind. 2004).

170. *AGS*, 884 N.E.2d at 306-07.

171. *Quandt*, 810 N.E.2d at 1029, 1033-34; *see also* IND. CODE § 24-2-3-2 (2007) (defining “misappropriation”).

172. *Quandt*, 810 N.E.2d at 1033.

173. *Id.* at 1033 n.4.

difference between the pre-emption provision as enacted by the General Assembly and the then-existing pre-emption provision in the uniform act.¹⁷⁴ The latter specified that the uniform act would displace ““conflicting tort . . . and other law of this State”” that provides civil remedies for trade secret misappropriation.¹⁷⁵ The court emphasized that focus on remedies and noted in contrast that Indiana’s provision refers to the area of criminal law as a whole, so that “the criminal law and its concomitant criminal remedies” are exempt from this provision of the Indiana Trade Secret Act.¹⁷⁶

Turning then to an analysis of the nature of the RICO action, the court focused on the defendant’s “predicate acts” that had to be proven, which included “various types of criminal activity” such as receiving stolen property.¹⁷⁷ Multiple offenses can fall into the category of “corrupt business influence,” which supports additional criminal liability.¹⁷⁸ In the court’s words, over and above “criminal law sanctions for such activities,” there is “a private right of action against such corrupt business influences.”¹⁷⁹ The court viewed these provisions as having the “common goal” of deterring “egregious and schematic criminal activity.”¹⁸⁰ Because the civil remedy is “derivative of the criminal law,” the court ruled that a RICO claim based on corruption in the form of “acquisition of economically valuable information through . . . artifice” is not pre-empted by the Indiana Trade Secrets Act.¹⁸¹

Thus, the court took the position that the use of “criminal law” in the Trade Secrets Act’s pre-emption provision is broad enough to encompass any action arising from conduct defined to be criminal, even if the action itself is in civil court.¹⁸² That position is consistent with the idea that the exception from pre-emption in the provision is broader than in the uniform act, and so more subject matter falls outside of pre-emption. Nevertheless, it seems somewhat counterintuitive to call what is clearly a civil action, giving a right of action to affected non-law-enforcement parties, a part of the criminal law. The AGS court made no secret of its disgust for defendants’ conduct noted in the findings from the preliminary injunction hearing, and it seems likely that such a feeling influenced the outcome on the pre-emption question.¹⁸³ Perhaps the result for this and similar questions is dependent on whether the focus is on preventing conduct that is detrimental to the public, versus redressing damage or providing restitution from an act or series of acts.

174. AGS, 884 N.E.2d at 307-09.

175. *Id.* at 307 (quoting UNIF. TRADE SECRETS ACT § 7 (amended 1985)).

176. *Id.* at 308.

177. *Id.*

178. *Id.*; *see also* IND. CODE § 34-24-2-6 (2008) (providing an action for injunctive relief and damages from “corrupt business influence”).

179. AGS, 884 N.E.2d at 308 (citing IND. CODE § 34-24-2-6 (2008)).

180. *Id.*

181. *Id.* at 308.

182. *Id.* at 308-09.

183. *See id.* at 300-05 (noting the extensive bad acts by defendants).

IX. *CENTRAL INDIANA PODIATRY, P.C. V. KRUEGER*¹⁸⁴

In the realm of non-competition agreements, the Indiana Supreme Court handed down an opinion addressing the specific situation of a physician leaving his or her medical practice, and the interpretation and effect of a noncompetition agreement between the physician and the practice.¹⁸⁵ Defendant Krueger was a podiatrist who had been employed by Central Indiana Podiatry (CIP) under a succession of employment agreements, each having restrictions on his activities following termination.¹⁸⁶ These restrictions included, for a period of two years after leaving CIP, (1) contacting patients to provide podiatry services, (2) soliciting CIP employees, and (3) practicing podiatry within fourteen central Indiana counties, any other county in which CIP maintained an office, and any county “adjacent” to those counties.¹⁸⁷ The counties included in that practice-restriction provision covered, in the court’s words, “essentially the middle half of the state.”¹⁸⁸

At various points, Krueger worked at offices in five counties, and during 2005, when Krueger was terminated, he was working at an office on the north side of Marion County, as well as in offices in Tippecanoe County and Howard County.¹⁸⁹ About two months after his termination, Krueger agreed to practice podiatry with Meridian Health Group, P.C. in Hamilton County, at an office Krueger characterized in a mailing as about ten minutes away from the CIP office in northern Marion County at which Krueger worked.¹⁹⁰

CIP sued for injunctive relief against Krueger and Meridian, but the trial court found the geographic restriction in the Krueger/CIP employment agreement to be unenforceable.¹⁹¹ After the court of appeals reversed that ruling, the supreme court granted transfer to review the restriction.¹⁹² The court found this case to present a matter of public interest capable of repetition, and so, even though any possible injunction had been mooted by the passage of time, it chose to address the matter.¹⁹³

Krueger raised four issues for the court to consider, two of which were treated at some length. The first of these was whether his non-competition agreement was void as against public policy as interfering with physician/patient relationships.¹⁹⁴ The court saw a significant difference between the general case

184. 882 N.E.2d 723 (Ind. 2008).

185. *Id.* at 725-26.

186. *Id.* at 725.

187. *Id.* at 725-26.

188. *Id.* at 726.

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.* at 726-27.

194. *Id.* at 727.

(considering that many times a non-competition agreement “affects only the interests of the employee and employer”) and the physician-specific case, which “involves other considerations as well.”¹⁹⁵ These considerations naturally centered on “the patients’ legitimate interest in selecting the physician of their choice,” based typically in confidence in the physician, and the fact that patients typically have “direct contact” with the physician at the latter’s office.¹⁹⁶ There is no question that the physician/patient relationship is, and has long been, considered a special relationship, deserving of particular handling. However, the court’s general characterizations of other scenarios for non-competition agreements seem to give short shrift to the interests of third parties who have developed comfortable relationships based in trust with salespersons, business consultants, or a variety of other employees. While it is granted that such relationships may not merit the sorts of protections given to those between doctors and their patients, arguments similar to Krueger’s in this case can be made with respect to other business fields.

Even so, the court was not persuaded by the relationship arguments Krueger advanced, nor by examples from other jurisdictions, preferring not to extend itself beyond existing Indiana precedent.¹⁹⁷ The Colorado,¹⁹⁸ Delaware,¹⁹⁹ and Massachusetts²⁰⁰ statutory elimination of non-competition agreements involving physicians, and the Tennessee Supreme Court’s 2005 holding that such agreements are against public policy (relying on an American Medical Association ethics opinion discouraging such agreements),²⁰¹ were not sufficient to cause the court to find for Krueger on this ground.²⁰² Instead, the court chose shelter in *Raymundo v. Hammond Clinic Ass’n*.²⁰³ The court noted that *Raymundo* had been decided at a time when the AMA’s ethics opinion was in place, and reasoned that it rejected a blanket prohibition on physicians’ non-competition agreements as it adopted a reasonableness standard for such agreements.²⁰⁴ The court went on to say that *Raymundo* was consistent with a majority of other jurisdictions, including a 2006 opinion from the Illinois Supreme Court.²⁰⁵ Following its discussion of the viability of *Raymundo*, the court noted that the legislature has not taken any steps on the issue, and left the

195. *Id.*

196. *Id.*

197. *Id.* at 728.

198. COLO. REV. STAT. ANN. § 8-2-113(3) (West 2007).

199. DEL. CODE ANN. tit. 6, § 2707 (2005).

200. MASS. GEN. LAWS ANN. ch. 112, § 12X (West 2003).

201. *Murfreesboro Med. Clinic, P.A. v. Udom*, 166 S.W.3d 674, 684 (Tenn. 2005).

202. *Cent. Ind. Podiatry*, 882 N.E.2d at 728.

203. 449 N.E.2d 276 (Ind. 1983).

204. *Cent. Ind. Podiatry*, 882 N.E.2d at 728.

205. *Id.* (citing *Mohanty v. St. John Heart Clinic, S.C.*, 866 N.E.2d 85, 95 (Ill. 2006); Ferdinand S. Tinio, Annotation, *Validity and Construction of Contractual Restrictions on Right of Medical Practitioner to Practice, Incident to Employment Agreement*, 62 A.L.R.3d 1014 §§ 6-25 (1975)).

proverbial ball in the legislature's court.²⁰⁶

The second issue focused on reasonableness, and was the basis on which the court found the geographic scope of the non-competition agreement to be too broad.²⁰⁷ The reasonableness analysis followed the standard themes in this area of the law—the disfavored nature of non-competition agreements and the employer's burden of demonstrating a legitimate interest protected by the agreement and the agreement's reasonableness as to the duration of restriction, activities and geographical scope.²⁰⁸ The court agreed with the appellate opinion that CIP's goal of protecting its patient population and preventing its loss in income was sufficient to serve "the legitimate interest of preserving patient relationships developed with CIP resources."²⁰⁹ That finding provides something of a blueprint for drafters of non-competition provisions in the medical field as to evidence of what the Indiana Supreme Court believes will support a non-competition provision.

Where CIP's provision failed, however, was in its geographical scope. Starting from the premise that such scope is a function of the employer's protected interest, the court noted that the only such interest involved in this case was development of a "patient base."²¹⁰ Given that interest, the court looked to the locations in which that investment coincided with Krueger's work.²¹¹ Where the noncompetition provision is "justified by the employer's development of patient relationships," the court limited the geographic scope to that in which the physician has had patient contact.²¹² Without any evidence that Krueger used CIP's resources to develop patient relationships for CIP in a number of the counties ostensibly covered in the employment agreement, the court found the agreement to be overbroad.²¹³ Since "blue-penciling" allows removal of provisions, but not rewriting of the agreement, the three counties in which it was proven Krueger worked within the relevant period were the only counties in which the noncompetition agreement would be enforced.²¹⁴ The majority opinion considered *all* of contiguous counties to be too broad—even if parts of other counties adjacent to Marion County might have some economic overlap, it could not be said that the *entire* contiguous county would have such overlap.²¹⁵

One other argument Krueger made bears some review. He argued that a prior material breach of the employment agreement by CIP had occurred, and thus, the noncompetition agreement was not enforceable.²¹⁶ The court considered the

206. *Id.*

207. *See id.* at 728-31.

208. *Id.* at 728-29.

209. *Id.* at 729.

210. *Id.* at 730.

211. *Id.* (citing Tinio, *supra* note 205, §§ 18-20).

212. *Id.*

213. *Id.*

214. *Id.* at 731.

215. *Id.*

216. *Id.* at 731-32.

alleged breach to be “arguably immaterial in the context of” the entire agreement.²¹⁷ Of particular interest, the court looked to the “no-defense” provision of the agreement, which stated that the noncompetition agreement

shall be construed as independent of any other provision . . . and shall survive the termination of this Contract. The existence of any claim or cause of action of [Krueger] against [CIP], whether predicated on this Contract or otherwise, shall not constitute a defense to the enforcement by [CIP] of this Restrictive Covenant.²¹⁸

The court found sparse authority from other jurisdictions on the enforceability of such provisions, but what authority it found upheld them “even in the face of apparently major breaches by the employer.”²¹⁹ The court did not explicitly approve that authority, and it left open the question of whether there is some employer breach that would “override” such a provision.²²⁰

Clearly, this case is instructive not only for its authority arising from the Indiana Supreme Court, but also for its requirement of a very direct correlation between the employer’s protectible interest and the restrictions—in time, geography, and otherwise—in a noncompetition agreement.²²¹ It is well known that such restrictive provisions must be carefully drafted if they are to be upheld. *Central Indiana Podiatry* does not merely repeat that caveat, but spells out the kind of restriction that can be sustained.²²² Had the geographic restriction been prepared in terms of miles from Krueger’s workplaces, or in units smaller than counties, the scope of the noncompetition provision might have been significantly greater. The court appeared receptive to considering geographic area in terms of economic influence or effect, and so a provision defining geographic scope in those terms might have been upheld. Even so, there is some logical disconnect in including all of Marion County in the injunction area because of work at a location in the far north of that county, while excluding all of Hamilton County, even those parts reasonably economically linked.

The restrictive use of the “blue pencil” doctrine is notable as well. The Indiana Supreme Court very clearly considered that doctrine as usable to *exclude* language from an agreement, and not merely to limit it.²²³ One could imagine that a legitimate limitation of the agreement would have been to define a smaller geographic region that was a part of the original region as the geographic scope

217. *Id.* at 732.

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.* at 730.

222. *See id.* at 730-31 (noting that where the noncompetition provision is “justified by the employer’s development of patient relationships[, it] must be limited to the area in which the physician has had patient contact” and that economic bonds between counties, or likelihood of patient travel across county lines was not sufficient).

223. *Id.* at 730.

of the agreement.²²⁴ Such a result would not have been an enlargement to the employee's detriment, and could have accomplished the aims of the law concerning noncompetition agreements. Nonetheless, the court viewed its ability to limit the geographical region as only in striking material out of the agreement. CIP's definition of territory in terms of counties meant that counties were either in or out—no in-between possibility exists under this court's conception of the blue-pencil doctrine.

224. *Id.* (“[T]he court may apply the blue pencil doctrine to permit enforcement of the reasonable portions. The blue pencil doctrine permits excising language but not rewriting the agreement.” (citation omitted)).

SURVEY OF RECENT DEVELOPMENTS IN INDIANA PRODUCT LIABILITY LAW

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INTRODUCTION

The 2008 survey period¹ produced some thought-provoking opinions for practitioners and judges who handle product liability litigation in Indiana. Indeed, the decisions rendered during this survey period raise nearly as many questions as they resolve, particularly when it comes to the intended scope of the Indiana Product Liability Act (IPLA).² This Survey does not attempt to address in detail all of the cases decided during the survey period.³ Rather, it examines

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1. The survey period is October 1, 2007, to September 30, 2008.
2. This Article follows the lead of the Indiana General Assembly and employs the term “product liability” (not “products liability”) when referring to actions governed by the IPLA.
3. Courts issued several important opinions in cases in which the theory of recovery was related to or in some way based upon “product liability” principles, but the appellate issue did not involve a question implicating substantive Indiana product liability law. Those decisions are not addressed in detail here because of space constraints, even though they may be interesting to Indiana product liability practitioners. *See generally* Ebea v. Black & Decker, Inc., No. 1:07-cv-1146-DFH-TAB, 2008 U.S. Dist. LEXIS 35833 (S.D. Ind. May 1, 2008) (denying a motion to dismiss based on Indiana’s Worker’s Compensation Act where defendant argued that the statute provided the employee with exclusive remedy for work related injuries); Kazmer v. Bayer Healthcare Pharm., Inc., No. 2:07-CV-112-TS, 2007 U.S. Dist. LEXIS 85789 (N.D. Ind. Nov. 19, 2007) (involving claims of relation back of amended complaint to correct names of defendants and to add new defendants.); McDaniel v. Synthes, Inc., No. 2:07-CV-245RM, 2007 U.S. Dist. LEXIS 80520 (N.D. Ind. Oct. 20, 2007) (dealing with a removal based on fraudulent joinder of non-diverse in-state defendants and granting a remand); Nature’s Link, Inc. v. Przybyla, 885 N.E.2d 709 (Ind. Ct. App. 2008) (granting a new trial for failure of other party to disclose expert witness pursuant to IND. TRIAL RULE 26(E)); Allianz Ins. Co. v. Guidant Corp., 884 N.E.2d 405 (Ind. Ct. App. 2008) (involving an insurance coverage dispute associated with the recall of a medical device used to repair abdominal aortic aneurysms), *trans. denied*, (Ind. Jan. 8, 2009); Fitz v. Rust-Oleum Corp., 883 N.E.2d 1177 (Ind. Ct. App.) (indemnity claim by marketer of spray paint against can

selected cases that discuss important, substantive product liability issues. This Survey also provides some background information, context, and commentary when appropriate.

I. THE SCOPE OF THE IPLA

The Indiana General Assembly first enacted the IPLA in 1978.⁴ It originally governed claims in tort utilizing both negligence and strict liability theories. In 1983, the General Assembly amended it to apply only to strict liability actions.⁵ In 1995, the General Assembly amended the IPLA to once again encompass theories of recovery based upon both strict liability and negligence.⁶

In 1998, the General Assembly repealed the entire IPLA and recodified it, effective July 1, 1998.⁷ The 1998 recodification did not make substantive revisions; it merely redesignated the statutory numbering system to make the IPLA consistent with the General Assembly's reconfiguration of statutes governing civil practice.

The IPLA, Indiana Code sections 34-20-1-1 to -9-1, governs and controls all actions that are brought by users or consumers against manufacturers or sellers for physical harm caused by a product, "regardless of the substantive legal theory or theories upon which the action is brought."⁸ When Indiana Code sections 34-20-1-1 and -2-1 are read together, there are five unmistakable threshold requirements for IPLA liability: (1) a claimant who is a user or consumer and is also "in the class of persons that the seller should reasonably foresee as being subject to the harm caused";⁹ (2) a defendant that is a manufacturer or a "seller . . . engaged in the business of selling [a] product";¹⁰ (3) "physical harm caused by a product";¹¹ (4) a product that is "in a defective condition unreasonably

manufacturer as a result of an injury caused by a can of spray paint), *trans. denied*, 898 N.E.2d 1228 (Ind. 2008).

4. Act of Mar. 10, 1978, No. 141, § 28, 1978 Ind. Acts 1308, 1308-10.

5. Act of Apr. 21, 1983, No. 297, 1983 Ind. Acts 1814.

6. Act of Apr. 26, 1995, No. 278, §§ 1-7, 1995 Ind. Acts 4051, 4051-56; *see* *Progressive Ins. Co. v. Gen. Motors Corp.*, 749 N.E.2d 484, 487 n.2 (Ind. 2001).

7. Act of Mar. 6, 1998, 1998 Ind. Acts 1. The current version of the IPLA is found in Indiana Code sections 34-20-1-1 to -9-1.

8. IND. CODE § 34-20-1-1 (2008).

9. Indiana Code section 34-20-1-1 identifies a proper IPLA claimant as a "user" or "consumer." Indiana Code section 34-20-2-1(1) requires that IPLA claimants be in the "class of persons that the seller should reasonably foresee as being subject to the harm caused by the defective condition."

10. Indiana Code section 34-20-1-1(2) identifies proper IPLA defendants as "manufacturers" or "sellers." Indiana Code section 34-20-2-1(2) provides the additional requirement that such a manufacturer or seller also be "engaged in the business of selling the product," effectively excluding corner lemonade stand operators and garage sale sponsors from IPLA liability.

11. IND. CODE § 34-20-1-1(3) (2008).

dangerous to [a] user or consumer” or to his property;¹² and (5) a product that “reach[ed] the user or consumer without substantial alteration in [its] condition.”¹³ Indiana Code section 34-20-1-1 makes clear that the IPLA governs and controls all claims that satisfy these five requirements, “regardless of the substantive legal theory or theories upon which the action is brought.”¹⁴

A. “User” or “Consumer”

The language the General Assembly employs in the IPLA is very important when determining who qualifies as IPLA claimants. Indiana Code section 34-20-1-1 provides that the IPLA governs claims asserted by “users” and “consumers.”¹⁵ For purposes of the IPLA, “consumer” means:

- (1) a purchaser;
- (2) any individual who uses or consumes the product;
- (3) any other person who, while acting for or on behalf of the injured party, was in possession and control of the product in question; or
- (4) any bystander injured by the product who would reasonably be expected to be in the vicinity of the product during its reasonably expected use.¹⁶

“User” has the same meaning as “consumer.”¹⁷ Several published decisions in

12. *Id.* § 34-20-2-1.

13. *Id.* § 34-20-2-1(3). Indiana Pattern Jury Instruction 7.03 sets out a plaintiff’s burden of proof in a product liability action. It requires a plaintiff to “prove each of the following propositions by a preponderance of the evidence”:

1. The defendant was a manufacturer of the product [or the part of the product] alleged to be defective and was in the business of selling the product;
2. The defendant sold, leased, or otherwise put the product into the stream of commerce;
3. The plaintiff was a user or consumer of the product;
4. The product was in a defective condition unreasonably dangerous to users or consumers (or to user’s or consumer’s property);
5. The plaintiff was in a class of persons the defendant should reasonably have foreseen as being subject to the harm caused by the defective condition;
6. The product was expected to and did reach the plaintiff without substantial alteration of the condition in which the defendant sold the product;
7. The plaintiff or the plaintiff’s property was physically harmed; and
8. The product was a proximate cause of the physical harm to the plaintiff or the plaintiff’s property.

IND. PATTERN JURY INSTRUCTIONS—CIVIL § 7.03 (2005).

14. IND. CODE § 34-20-1-1 (2008).

15. *Id.*

16. *Id.* § 34-6-2-29.

17. *Id.* § 34-6-2-147.

recent years construe the statutory definitions of “user” and “consumer.”¹⁸

A literal reading of the IPLA demonstrates that even if a claimant qualifies as a statutorily-defined “user” or “consumer,” he or she also must satisfy another statutorily-defined threshold before proceeding with a claim under the IPLA. That additional threshold is found in Indiana Code section 34-20-2-1(1), which requires that the “user” or “consumer” also be “in the class of persons that the seller should reasonably foresee as being subject to the harm caused by the defective condition.”¹⁹ Thus, the plain language of the statute assumes that a person or entity must already qualify as a “user” or a “consumer” *before* a separate “reasonable foreseeability” analysis is undertaken. In that regard, the IPLA does not appear to provide a remedy to a claimant whom a seller might reasonably foresee as being subject to the harm caused by a product’s defective condition if that claimant falls outside of the IPLA’s definition of “user” or “consumer.”

There were no significant published decisions during the survey period that interpreted the terms “user” or “consumer.”²⁰

18. See *Butler v. City of Peru*, 733 N.E.2d 912, 919 (Ind. 2000) (mentioning that a maintenance worker could be considered a “user or consumer” of an electrical transmission system because his employer was the ultimate user and he was an employee of the “consuming entity”); *Estate of Shebel v. Yaskawa Elec. Am., Inc.*, 713 N.E.2d 275, 279 (Ind. 1999) (holding that a “user or consumer” includes a distributor who uses the product extensively for demonstration purposes). For a more detailed analysis of *Butler*, see Joseph R. Alberts & David M. Henn, *Survey of Recent Developments in Indiana Product Liability Law*, 34 IND. L. REV. 857, 870-72 (2001). For a more detailed analysis of *Estate of Shebel*, see Joseph R. Alberts, *Survey of Recent Developments in Indiana Product Liability Law*, 33 IND. L. REV. 1331, 1333-36 (2000).

19. Indiana Code section 34-20-2-1 imposes liability when
a person who sells, leases, or otherwise puts into the stream of commerce any product
in a defective condition unreasonably dangerous to any user or consumer or to the user’s
or consumer’s property . . . if . . . that user or consumer is in the class of persons that the
seller should reasonably foresee as being subject to the harm caused by the defective
condition.

20. During the 2006 survey period, the Indiana Supreme Court decided *Vaughn v. Daniels Co. (West Virginia), Inc.*, 841 N.E.2d 1133 (Ind. 2006). That case helped to further define who qualifies as a “user” or “consumer” for purposes of bringing an action under the IPLA. In that case, Daniels Company (Daniels) designed and built a coal preparation plant at a facility owned by Solar Sources, Inc. (Solar). *Id.* at 1136. Part of the design involved the installation of a heavy media coal sump. *Id.* An out-of-state steel company manufactured the sump that Daniels designed and sent it, unassembled, to the facility. *Id.* Stephen Vaughn worked for the construction company that Daniels hired to install the sump. *Id.* During the installation process, Vaughn climbed onto the top of the sump to help connect a pipe. *Id.* The chain he was using to secure the pipe in place gave way, causing Vaughn to fall and sustain injuries. *Id.* Vaughn did not wear his safety belt when he climbed onto the sump. *Id.* The Indiana Supreme Court held that Daniels could not be liable under the IPLA because Vaughn was not a “user” or “consumer.” *Id.* at 1141-43. Because the “product” was not assembled and installed at the time of Vaughn’s accident, “neither Vaughn nor anyone else was a user of the product at the time it was still in the process of assembly and installation.” *Id.* at

B. “Manufacturer” or “Seller”

For purposes of the IPLA, “[m]anufacturer’ . . . means a person or an entity who designs, assembles, fabricates, produces, constructs, or otherwise prepares a product or a component part of a product before the sale of the product to a user or consumer.”²¹ “‘Seller’ . . . means a person engaged in the business of selling or leasing a product for resale, use, or consumption.”²² Indiana Code section 34-20-2-1(2) employs nearly identical language when addressing the threshold requirement that liability under the IPLA will not attach unless “the seller is engaged in the business of selling the product.”²³

Sellers can be held liable as manufacturers in two ways. First, a seller can be held liable as a manufacturer if the seller fits within the definition of “manufacturer” found in Indiana Code section 34-6-2-77(a), which expressly includes a seller who:

- (1) has actual knowledge of a defect in a product;
- (2) creates and furnishes a manufacturer with specifications relevant to the alleged defect for producing the product or who otherwise exercises some significant control over all or a portion of the manufacturing process;
- (3) alters or modifies the product in any significant manner after the product comes into the seller’s possession and before it is sold to the ultimate user or consumer;
- (4) is owned in whole or significant part by the manufacturer; or
- (5) owns in whole or significant part the manufacturer.²⁴

Second, a seller can be deemed a statutory “manufacturer” and, therefore, be held liable to the same extent as a manufacturer in one other limited circumstance. Indiana Code section 34-20-2-4 provides that a seller may be deemed a “manufacturer” “if the court is unable to hold jurisdiction over a

1139.

21. IND. CODE § 34-6-2-77 (2008).

22. *Id.* § 34-6-2-136.

23. *Id.* § 34-20-2-1(2); *see, e.g.*, *Williams v. REP Corp.*, 302 F.3d 660, 662-64 (7th Cir. 2002) (recognizing that Indiana Code section 33-1-1.5-2(3), the predecessor to Indiana Code section 34-20-2-1, imposes a threshold requirement that an entity must have sold, leased, or otherwise placed a defective and unreasonably dangerous product into the stream of commerce before IPLA liability can attach and before that entity can be considered a “manufacturer” or “seller”); *Del Signore v. Asphalt Drum Mixers*, 182 F. Supp. 2d 730, 745-46 (N.D. Ind. 2002) (holding that although the defendant provided some technical guidance or advice relative to ponds at an asphalt plant, such activity was not sufficient to constitute substantial participation in the integration of the plant with the pond so as to deem it a “manufacturer” of the plant); *see also* Joseph R. Alberts & James M. Boyers, *Survey of Recent Developments in Indiana Product Liability Law*, 36 IND. L. REV. 1165, 1170-72 (2003).

24. IND. CODE § 34-6-2-77(a) (2008).

particular manufacturer” and if the seller is the “manufacturer’s principal distributor or seller.”²⁵

Practitioners also must be aware that when the theory of liability is based upon “strict liability in tort,”²⁶ Indiana Code section 34-20-2-3 provides that an entity that is merely a “seller” and cannot otherwise be deemed a “manufacturer” is not liable and is not a proper IPLA defendant.²⁷

A few recent Indiana decisions have addressed the statutory definitions of “seller” and “manufacturer.”²⁸ The 2008 survey period produced a couple of

25. *Id.* § 34-20-2-4. *Kennedy v. Guess, Inc.*, 806 N.E.2d 776 (Ind. 2004), is the most recent case interpreting Indiana Code section 34-20-2-4 and specifically addressing the circumstances under which entities may be considered “manufacturers” or “sellers” under the IPLA. *See also* *Goines v. Fed. Express Corp.*, No. 99-CV-4307-JPG, 2002 U.S. Dist. LEXIS 5070, at *14-15 (S.D. Ill. Jan. 8, 2002). The court, applying Indiana law, examined the “unable to hold jurisdiction over” requirement of Indiana Code section 34-20-2-4. *Id.* at *9. The plaintiff assumed that “jurisdiction” refers to the power of the court to hear a particular case. *Id.* at *9-10. The defendant argued that the phrase equates to “personal jurisdiction.” *Id.* at *12. The court refused to resolve the issue, deciding instead to simply deny the motion for summary judgment because the designated evidence did not clearly establish entitlement to application of Indiana Code section 34-20-2-4. *Id.* at *14-15.

26. The phrase “strict liability in tort,” to the extent that the phrase is intended to mean “liability without regard to reasonable care,” appears to encompass only claims that attempt to prove that a product is defective and unreasonably dangerous by utilizing a manufacturing defect theory. Indiana Code section 34-20-2-2 provides that cases utilizing a design defect or a failure to warn theory are judged by a negligence standard, not a “strict liability” standard.

27. IND. CODE § 34-20-2-3 (2008). In *Ritchie v. Glidden Co.*, 242 F.3d 713, 725-26 (7th Cir. 2001), the court cited what is now Indiana Code section 34-20-2-3 for the proposition that sellers in a product liability action may not be liable unless the seller can be deemed a manufacturer. Applying that reading of what is now Indiana Code section 34-20-2-3, the court held that defendant Glidden could not be liable pursuant to the IPLA because the plaintiff failed to designate sufficient facts to demonstrate that Glidden had actual knowledge of an alleged product defect (lack of warning labels) and because Glidden did not meet any of the other statutory definitions or circumstances under which it could be deemed a manufacturer. *Id.* There is an omission in the *Ritchie* court’s citation to what is now Indiana Code section 34-20-2-3 that may be quite significant. The statutory provision quoted in *Ritchie* leaves out the following important highlighted language: “[A] product liability action [*based on the doctrine of strict liability in tort*] may not be commenced or maintained.” *Id.* at 725 (emphasis added). The *Ritchie* case involved a failure to warn claim against Glidden under the IPLA. *Id.* Indiana Code section 34-20-2-2 makes it clear that “liability without regard to the exercise of reasonable care” (strict liability) applies now only to product liability claims alleging a manufacturing defect theory. Claims alleging design or warning defect theories are controlled by a negligence standard. *See, e.g.,* *Burt v. Makita USA, Inc.*, 212 F. Supp. 2d 893, 899 (N.D. Ind. 2002); *see also* *Alberts & Boyers, supra* note 23, at 1173-75.

28. There have been some important recent decisions in this area. *See* *Fellner v. Philadelphia Toboggan Coasters, Inc.*, No. 3:05-cv-218-SEB-WGH, 2006 WL 2224068 (S.D. Ind. Aug. 2, 2006) (involving a girl who was killed when she was ejected from a wooden roller coaster operated as an attraction at Holiday World amusement park); *Thornburg v. Stryker Corp.*, No. 1:05-cv-1378-RLY-

federal decisions that are relevant in this area. In the first case, *Mesman v. Crane Pro Services*,²⁹ John Mesman suffered serious leg injuries when a load of steel sheets fell on him while he was unloading them from a railcar.³⁰ The plant used a crane to do the unloading.³¹ Before the accident, Mesman's employer hired defendant Konecranes, Inc. to rebuild the crane.³² Konecranes evaluated the design and operation of the crane and made several design changes, including supplementing the controls in the operator's cab with a hand-held remote-control device that the operator could use to control the crane from the ground.³³ On the day of the accident, one of Mesman's co-workers was operating the crane using the remote while Mesman worked in one of the railcars.³⁴ The co-worker failed to press an emergency stop button on the remote to avert a collision between two parts of the crane.³⁵ That collision caused the load to fall, resulting in Mesman's injuries.³⁶

The trial judge permitted Konecranes to argue that it could not be responsible under the IPLA for liability arising out of the design of the crane because the company had merely "repaired" the crane and, therefore, did not manufacture it.³⁷ Reviewing that issue on appeal, the Seventh Circuit determined that the trial judge should not have permitted Konecranes to argue that it could not be liable under the IPLA because it did not manufacture the crane.³⁸ Although it is true that the IPLA does not countenance design defect liability for those persons or entities who merely repair a product, it does recognize design defect liability for those persons or entities who "rebuild" or otherwise engage in efforts to "re-design" a product.³⁹ The Seventh Circuit believed that the evidence demonstrated unequivocally that "Konecranes rebuilt the crane, [specifically] altering its design to enable it to be operated from ground level rather than just from the overhead cab."⁴⁰ As such, Konecranes should not have been allowed to argue that it could avoid IPLA liability under the circumstances.⁴¹

TAB, 2006 WL 1843351 (S.D. Ind. June 29, 2006) (involving a plaintiff who filed product liability and medical malpractice claims after hip replacement surgery).

29. 512 F.3d 352 (7th Cir. 2008).

30. *Id.* at 353.

31. *Id.*

32. *Id.*

33. *Id.* The precise changes that Konecranes made are discussed in detail *infra* Part I.D.2.

34. *Id.* at 354.

35. *Id.*

36. *Id.*

37. *Id.* at 356.

38. *Id.*

39. *Id.* (citing *Richardson v. Gallo Equip. Co.*, 990 F.2d 330 (7th Cir. 1993); *Lenhardt Tool & Die Co. v. Lumpe*, 703 N.E.2d 1079, 1085 (Ind. Ct. App. 1998)).

40. *Id.*

41. *Id.* Interestingly, the court found that the trial court's error in permitting Konecranes to argue it was not liable because it merely "repaired" the crane was "inconsequential" because the plaintiffs were also allowed to pursue a "common law negligence" claim. *Id.* We discuss that

Another federal case, *LaBonte v. Daimler-Chrysler (LaBonte II)*,⁴² provides some additional guidance for practitioners in this area.⁴³ Kelly LaBonte was killed in an automobile accident on May 29, 2005, while driving a 1996 Jeep Grand Cherokee.⁴⁴ Plaintiff claimed that during the accident the seatbelt retractor unlocked, permitting the seatbelt to spool out.⁴⁵ A label on the seatbelt webbing read that the restraint was manufactured by AlliedSignal on April 4, 1996.⁴⁶

Plaintiff sued Daimler-Chrysler and Key Safety Systems alleging, among other things, that Key was the manufacturer of the seatbelt.⁴⁷ Key, however, did not even begin manufacturing seat belts until more than a year after the seat belt at issue was manufactured.⁴⁸ It was at that time that Key's predecessor, Breed Technologies, Inc.,⁴⁹ purchased certain assets from AlliedSignal.⁵⁰ As part of the purchase of AlliedSignal's assets, Key agreed to assume some of AlliedSignal's potential liabilities.⁵¹ Roughly two years after it purchased the assets from AlliedSignal, Key filed for bankruptcy reorganization under Chapter XI. In the proceeding, Key discharged any claim that arose from any agreement entered before its bankruptcy confirmation order.⁵² In its reorganization plan, Key did not affirm any of the potential liabilities assumed or contemplated in the AlliedSignal asset purchase agreement.⁵³ Key moved for summary judgment

portion of the court's analysis *infra* Part I.E.

42. No. 3:07-CV-232-TS, 2008 WL 513319 (N.D. Ind. Feb. 22, 2008).

43. To fully understand *LaBonte*, there are two decisions that must be reviewed and considered. The first, *LaBonte v. Daimler-Chrysler (LaBonte I)*, No. 3:07-CV-232-TS, 2008 U.S. Dist. LEXIS 11384 (N.D. Ind. Feb. 14, 2008) (*LaBonte I*), was decided on February 14, 2008. The second, *LaBonte v. Daimler-Chrysler (LaBonte II)*, No. 3:07-CV-232-TS, 2008 WL 513319 (N.D. Ind. Feb. 22, 2008), was decided on February 22, 2008. In *LaBonte I*, the court denied Key Safety Systems summary judgment motion without prejudice because, even though unopposed, the court was not satisfied that Key could not be liable as a successor manufacturer to AlliedSignal. *LaBonte I*, 2008 U.S. Dist. LEXIS 11384, at *7-13. On rehearing in *LaBonte II*, however, the court granted Key's motion. *LaBonte II*, 2008 WL 513319, at *1-2.

44. *LaBonte II*, 2008 WL 513319, at *1.

45. *LaBonte I*, 2008 U.S. Dist. LEXIS 11384, at *5.

46. *Id.*

47. *Id.* at *2.

48. *Id.* at *5-6.

49. In 2003, Breed Technologies, Inc., changed its name to Key Safety Systems, Inc. *Id.* at *6. Even though some of the events pertinent to the court's decision occurred prior to Breed Technologies changing its name to Key Safety Systems, for the sake of consistency and easier comprehension, the authors have used Key throughout the discussion. The name change was not significant to the court's analysis or decision.

50. *Id.* at *5.

51. *Id.*

52. *Id.* at *5-6.

53. *Id.*

asserting that it was not the manufacturer of the seat belt.⁵⁴ The court quoted the definition of manufacturer from the IPLA⁵⁵ and easily determined that Key was not the manufacturer of the seat belt because it was manufactured over eighteen months before Key entered the occupant restraint manufacturing business.⁵⁶ Nonetheless, the court analyzed whether Key could be liable as a successor to the original manufacturer, AlliedSignal.

Initially, the court noted that when one corporation purchases the assets of another, the purchaser does not assume the debts and liabilities of the seller unless one of four exceptions recognized under Indiana law creating successor liability exists.⁵⁷ The four exceptions to Indiana's general rule of non-liability are: (1) an implied or express agreement to assume the obligation; (2) a fraudulent sale to escape liability; (3) a de facto consolidation or merger; and, (4) where the purchase was a mere continuation of the seller.⁵⁸ The court noted that the first exception applied because Key agreed to accept liability in its purchase agreement with AlliedSignal; however, because of Key's bankruptcy, the bankruptcy court had discharged any liability Key agreed to bear in the purchase agreement years earlier.⁵⁹ The discharge, however, had no impact on the three remaining exceptions.⁶⁰ Key's summary judgment filings did not discuss, and no evidence was designated to address, the remaining three exceptions.⁶¹ Thus the court could not conclude on the record it had before it that none of the other exceptions applied.⁶² Therefore, the court denied Key's motion, but allowed it to refile a second motion addressing the other exceptions to the general rule of successor non-liability.⁶³

54. *Id.* at *1.

55. Indiana Code section 34-6-2-77 defines a manufacturer as "a person or entity who designs, assembles, fabricates, produces, constructs, or otherwise prepares a product or a component part of a product before the sale of the product to a user or consumer."

56. *LaBonte I*, 2008 U.S. Dist. LEXIS 11384, at *7.

57. *Id.* at *7-8 (citing *Guerrero v. Allison Engine Co.*, 725 N.E.2d 479, 482 (Ind. Ct. App. 2000)).

58. *Id.* at *8 (citing *Guerrero*, 725 N.E.2d at 482).

59. *Id.*

60. The three exceptions not addressed were: (1) a fraudulent sale to escape liability; (2) a de facto consolidation or merger; and, (3) where the purchase was a mere continuation of the seller.

61. *Id.* at *8-9.

62. *Id.* at *9. Key also argued that the bankruptcy discharge prevented it from being sued as AlliedSignal's successor. *Id.* The court did not agree. *Id.* at *9-10. It concluded that Key's argument was inconsistent with *Fogel v. Zell*, 221 F.3d 955, 960 (7th Cir. 2000), because ordinary tort victims have no claim, for bankruptcy purposes, until an injury occurs. *Id.* at *10-12. And, the court reasoned, the case before it was not a mass tort situation where, even though the claim may not have been ripe when the bankruptcy was filed, the bankruptcy proceeding nevertheless discharged the claim. *Id.* at *11-12. Instead, the plaintiff did not have a claim when Key filed for bankruptcy so the estate's claim was not discharged. *Id.* at *12.

63. *Id.* at *12-13.

Five days later, Key filed a motion to reconsider.⁶⁴ This time Key designated evidence that AlliedSignal, the corporation from whom Key purchased assets to enter the occupant restraint business and who made the seat belt years prior to Ms. LaBonte's death, was a solvent Delaware corporation.⁶⁵ The court noted that the exceptions to the general rule of non-liability of a successor corporation require that the predecessor corporation cease to exist.⁶⁶ The court first noted that it had earlier determined that Key was not the manufacturer and that any obligation to assume liability through the asset purchase agreement was discharged in the bankruptcy proceeding.⁶⁷ It then reasoned that because AlliedSignal continued to exist, Key could not be liable as its successor corporation.⁶⁸ Because Key was neither the manufacturer of the seat belt nor liable as a successor corporation to the manufacturer, it was entitled to judgment as a matter of law and the court entered final judgment in its favor.⁶⁹

C. Physical Harm Caused by a Product

For purposes of the IPLA, "[p]hysical harm" . . . means bodily injury, death, loss of services, and rights arising from any such injuries, as well as sudden, major damage to property."⁷⁰ It "does not include gradually evolving damage to property or economic losses from such damage."⁷¹

For purposes of the IPLA, "[p]roduct" . . . means any item or good that is personalty at the time it is conveyed by the seller to another party."⁷² "The term does not apply to a transaction that, by its nature, involves wholly or

64. *LaBonte v. Daimler-Chrysler (LaBonte II)*, No. 3:07-CV-232-TS, 2008 WL 513319, at *1 (N.D. Ind. Feb. 22, 2008).

65. *Id.* at *1-2.

66. *Id.* at *1 (quoting *Guerrero v. Allison Engine Co.*, 725 N.E.2d 479, 482 (Ind. Ct. App. 2000)).

67. *Id.*

68. *Id.* at *2.

69. *Id.*

70. IND. CODE § 34-6-2-105(a) (2008).

71. *Id.* § 34-6-2-105(b); *see, e.g., Miceli v. Ansell, Inc.*, 23 F. Supp. 2d 929, 933 (N.D. Ind. 1998) (denying a motion to dismiss a case determining that Indiana recognizes that pregnancy may be considered a "harm" in certain circumstances); *Fleetwood Enters., Inc. v. Progressive N. Ins. Co.*, 749 N.E.2d 492, 493 (Ind. 2001) (holding that "personal injury and damage to other property from a defective product are actionable under the [IPLA], but their presence does not create a claim under the Act for damage to the product itself"); *Progressive Ins. Co. v. Gen. Motors Corp.*, 749 N.E.2d 484, 486 (Ind. 2001) (holding that there is no recovery under the IPLA where a claim is based on damage to the defective product itself); *see also Great N. Ins. Co. v. Buddy Gregg Motor Homes, Inc.*, No. IP 00-1378-C-H/K, 2002 U.S. Dist. LEXIS 7830, at *2 (S.D. Ind. Apr. 29, 2002) (holding that there was no recovery under the IPLA in a case involving a motor home destroyed in a fire allegedly caused by a defective wire in the engine compartment).

72. IND. CODE § 34-6-2-114(a) (2008).

predominantly the sale of a service rather than a product.”⁷³

D. Defective and Unreasonably Dangerous

Only products that are in a “defective condition” are subject to IPLA liability.⁷⁴ For purposes of the IPLA, a product is in a “defective condition”

if, at the time it is conveyed by the seller to another party, it is in a condition:

(1) not contemplated by reasonable persons among those considered expected users or consumers of the product; and

(2) that will be unreasonably dangerous to the expected user or consumer when used in reasonably expectable ways of handling or consumption.⁷⁵

Recent cases confirm that establishing one of the foregoing threshold requirements without the other will not result in liability under the IPLA.⁷⁶

Claimants in Indiana may prove that a product is in a “defective condition” by asserting one or a combination of three theories: (1) the product has a defect in its design (a “design defect”); (2) the product lacks adequate or appropriate warnings (a “warning defect”); or (3) the product has a defect that is the result of a malfunction or impurity in the manufacturing process (a “manufacturing defect”).⁷⁷

73. *Id.* § 34-6-2-114(b). Although it is a “not for publication” memorandum decision, *Fincher v. Solar Sources, Inc.*, No. 42A01-0701-CV-25, 2007 WL 1953473 (Ind. Ct. App.) (mem.), *trans. denied*, 878 N.E.2d 218 (Ind. 2007), is an opinion that was rendered during the 2007 survey period to which practitioners may look for additional guidance about what is and what is not a “product” for purposes of the IPLA. In *Fincher*, the plaintiff was a truck driver who was injured in an accident while hauling coal sludge. *Id.* at *1. Coal sludge has a wet consistency and is comprised of the fine particulate matter that remains after raw coal is mined and put through a washing process. *Id.* A panel of the Indiana Court of Appeals unanimously agreed that coal sludge was not a product under the IPLA. *Id.* at *6. According to the *Fincher* court,

The coal sludge in question is a waste by-product of a coal mining operation. It is trash. The coal sludge was not marketable or ever in a marketed state. It was not sold or being transported to a consumer. It was being transported to a disposal site. It was also never intended for consumption or for any use by any consumer.

Id.

74. IND. CODE § 34-20-2-1(1) (2008); *see also* *Westchester Fire Ins. Co. v. Am. Wood Fibers, Inc.*, No. 2:03-CV-178-TS, 2006 WL 3147710, at *5 (N.D. Ind. Oct. 31, 2006).

75. IND. CODE § 34-20-4-1 (2008).

76. *See Baker v. Heye-Am.*, 799 N.E.2d 1135, 1140 (Ind. Ct. App. 2003) (“[U]nder the IPLA, the plaintiff must prove that the product was in a defective condition that rendered it unreasonably dangerous.” (citing *Cole v. Lantis Corp.*, 714 N.E.2d 194, 198 (Ind. Ct. App. 1999))).

77. *See First Nat’l Bank & Trust Corp. v. Am. Eurocopter Corp. (Inlow II)*, 378 F.3d 682, 689 (7th Cir. 2004); *Westchester Fire Ins. Co.*, 2006 WL 3147710, at *5; *Baker*, 799 N.E.2d at 1140; *Natural Gas Odorizing, Inc. v. Downs*, 685 N.E.2d 155, 161 (Ind. Ct. App. 1997). Additional authority is found in *Troutner v. Great Dane Ltd. Partnership*, No. 2:05-CV-040-PRC,

Although claimants are free to assert any of those three theories for proving that a product is in a “defective condition,” the IPLA provides explicit statutory guidelines identifying when products are not defective as a matter of law. Indiana Code section 34-20-4-3 provides that “[a] product is not defective under [the IPLA] if it is safe for reasonably expectable handling and consumption. If an injury results from handling, preparation for use, or consumption that is not reasonably expectable, the seller is not liable under [the IPLA].”⁷⁸ In addition, Indiana Code section 34-20-4-4 provides that “[a] product is not defective under [the IPLA] if the product is incapable of being made safe for its reasonably expectable use, when manufactured, sold, handled, and packaged properly.”⁷⁹

In addition to the two specific statutory pronouncements identifying when a product is not “defective” as a matter of law, Indiana law also defines when a product may be considered “unreasonably dangerous” for purposes of the IPLA. A product is “unreasonably dangerous” only if its use “exposes the user or consumer to a risk of physical harm . . . beyond that contemplated by the ordinary consumer who purchases [it] with the ordinary knowledge about the product’s characteristics common to the community of consumers.”⁸⁰ A product is not

2006 WL 2873430 (N.D. Ind. Oct. 5, 2006), which confirms that a plaintiff’s product liability claim will fail as a matter of law if he or she does not articulate a legitimate manufacturing, design, or warning defect. In that case, the plaintiff was a semi-truck driver who fell and suffered head injury when a grab bar mounted on his trailer gave way. *Id.* at *1. The plaintiff sued the companies that manufactured and sold the trailer and the grab bar, alleging that they placed a trailer with a grab bar into the stream of commerce in a defective and unreasonably dangerous condition. *Id.* The case was removed to federal court, and both manufacturing defendants moved for summary judgment, pointing out that “plaintiff’s own expert . . . testified that the most likely cause of the failure of the grab bar was inadequate and negligent maintenance.” *Id.* at *3. The plaintiff did not file a response to either motion. *Id.* at *1. Because, under such circumstances, no reasonable jury could find for plaintiff on the product liability claims, the court granted summary judgment. *Id.* at *3.

78. IND. CODE § 34-20-4-3 (2008). One recent case discussing “reasonably expectable use” is *Hunt v. Unknown Chemical Manufacturer No. One*, No. IP 02-389-C-M/S, 2003 U.S. Dist. LEXIS 20138, at *28-32 (S.D. Ind. Nov. 5, 2003). In *Hunt*, a homeowner tore down and burned a deck that was made from lumber treated with chromium copper arsenate. *Id.* at *3-4. He spread the ashes as fertilizer in the family garden. *Id.* at *4. Later tests of the soil in the garden revealed elevated levels of arsenic. *Id.* Judge Larry McKinney held that the homeowner could not pursue product liability claim because his use of the lumber was not, legally speaking, foreseeable, intended, or expected. *Id.* at *27-37.

79. IND. CODE § 34-20-4-4 (2008).

80. *Id.* § 34-6-2-146; see also *Baker*, 799 N.E.2d at 1140; *Cole v. Lantis Corp.*, 714 N.E.2d 194, 199 (Ind. Ct. App. 1999). In *Baker*, a panel of the Indiana Court of Appeals wrote that “[t]he question whether a product is unreasonably dangerous is *usually* a question of fact that must be resolved by the jury.” 799 N.E.2d at 1140 (emphasis added) (citing *Vaughn v. Daniels Co. (W. Va.), Inc.*, 777 N.E.2d 1110, 1128 (Ind. Ct. App. 2002), *vacated*, 841 N.E.2d 1133 (2006)). Those panels also seem to favor jury resolution in determining reasonably expected use. Indeed, the *Baker* opinion states that

reasonably expectable use, like reasonable care, involves questions concerning the

unreasonably dangerous as a matter of law if it injures in a way or in a fashion that, by objective measure, is known to the community of persons consuming the product.⁸¹

In cases alleging improper design or inadequate warnings as the theory for proving that a product is in a “defective condition,” recent decisions have quite clearly recognized that the substantive defect analysis (i.e., whether a design was inappropriate or whether a warning was inadequate) should *follow* a threshold analysis that first examines whether, in fact, the product at issue is “unreasonably

ordinary prudent person, or in the case of products liability, the ordinary prudent consumer. The manner of use required to establish “reasonably expectable use” under the circumstances of each case is a matter peculiarly within the province of the jury. *Id.* (citing *Vaughn*, 777 N.E.2d at 1128).

It would seem incorrect, however, to conclude from those pronouncements that there exists something akin to a presumption that juries always *should* resolve whether a product is unreasonably dangerous or whether a use is reasonably expectable. Indeed, recent cases have resolved the defective and unreasonably dangerous issue as a matter of law in a design defect context even in the presence of divergent expert testimony.

In *Burt v. Makita USA, Inc.*, 212 F. Supp. 2d 893 (N.D. Ind. 2002), the plaintiff was injured when a blade guard on a circular table saw struck him in the eye after one of his co-workers left the guard “in what appeared to be in the installed position.” *Id.* at 895. With respect to the defective design claims, plaintiff’s expert opined that the saw was defective and unreasonably dangerous by its design, suggesting that the saw could be designed so that the guard could be attached without tools or that the tools could be physically attached to the saw. *Id.* at 900. The court rejected the claim, holding that the plaintiff and his expert had “wholly failed to show a feasible alternative design that would have reduced the risk of injury.” *Id.*; *see also* *Miller v. Honeywell Int’l, Inc.*, No. IP 98-1742 C-M/S, 2002 U.S. Dist. LEXIS 20478, at *1-4 (S.D. Ind. Oct. 15, 2002) (holding that Honeywell’s design specifications for planetary gears and gear carrier assembly within the engine of an Army UH-1 helicopter were not defective as a matter of law at the time the specifications were introduced into the stream of commerce).

81. *See Baker*, 799 N.E.2d at 1140; *see also* *Moss v. Crosman Corp.*, 136 F.3d 1169, 1174 (7th Cir. 1998) (writing that a product may be “dangerous” in the colloquial sense, but not “unreasonably dangerous” for purposes of IPLA liability). An open and obvious danger negates liability. “To be unreasonably dangerous, a defective condition must be hidden or concealed [and] evidence of the open and obvious nature of the danger . . . negates a necessary element of the plaintiff’s prima facie case that the defect was hidden.” *Hughes v. Battenfeld Gloucester Eng’g Co.*, No. TH 01-0237-C T/H, 2003 U.S. Dist. LEXIS 17177, at *7-8 (S.D. Ind. Aug. 20, 2003) (quoting *Cole*, 714 N.E.2d at 199). In *Hughes*, the plaintiff injured his hand while separating and rethreading plastic film through a machine called a secondary treater nip station. *Id.* at *2-3. Plaintiff admitted that he knew about the dangers associated with using the nip station because he was aware of reports by co-workers who were injured performing similar tasks. *Id.* at *4. Plaintiff testified that he was aware of the alleged defect that caused his accident, and on two previous occasions he had filed written suggestions with his employer requesting that it reduce the risk of injury involved. *Id.* at *4. Judge Tinder held that the dangerous condition of the nip station was open and obvious as a matter of law and entered summary judgment. *Id.* at *17.

dangerous.”⁸²

The IPLA provides that liability attaches for placing a product in a “defective condition”⁸³ in the stream of commerce even though: “(1) the seller has exercised all reasonable care in the manufacture and preparation of the product; and (2) the user or consumer has not bought the product from or entered into any contractual relation with the seller.”⁸⁴ What the IPLA bestows, however, in terms of liability despite the exercise of “all reasonable care [i.e., fault],” it then removes for design and warning defect cases, replacing it with a negligence standard:

[I]n an action based on an alleged design defect in the product or based on an alleged failure to provide adequate warnings or instructions regarding the use of the product, the party making the claim must establish that the manufacturer or seller failed to exercise reasonable care under the circumstances in designing the product or in providing the warnings or instructions.⁸⁵

The statutory language therefore imposes a negligence standard in all product liability claims relying upon a design or warning theory to prove defectiveness, while retaining strict liability (liability despite the “exercise of all reasonable care”) only for those claims relying upon a manufacturing defect theory.⁸⁶ Thus,

82. Indeed, in *Bourne v. Marty Gilman, Inc.*, No. 1:03-cv-01375-DFH-VSS, 2005 U.S. Dist. LEXIS 15467, at *1 (S.D. Ind. July 20, 2005), *aff’d*, 452 F.3d 632 (7th Cir. 2006) (involving an alleged design defect) and *Conley v. Lift-All Co.*, No. 1:03-cv-01200-DFH-TAB, 2005 U.S. Dist. LEXIS 15468, at *1 (S.D. Ind. July 25, 2005) (involving an alleged warnings defect), Judge Hamilton followed that precise approach.

83. IND. CODE § 34-20-2-1(1) (2008).

84. *Id.* § 34-20-2-2.

85. *Id.*

86. See *Mesman v. Crane Pro Servs.*, 409 F.3d 846, 849 (7th Cir. 2005) (“Under Indiana’s products liability law, a design defect can be made the basis of a tort suit only if the defect was a result of negligence in the design.”); *First Nat’l Bank & Trust Corp. v. Am. Eurocopter Corp. (Inlow II)*, 378 F.3d 682, 690 n.4 (7th Cir. 2004) (“Both Indiana’s 1995 statute (applicable to this case) and its 1998 statute abandoned strict liability in design defect and failure to warn cases. Hence, unlike manufacturing defects, for which manufacturers are still held strictly liable, claims of design defect and failure to warn must be proven using negligence principles.”); *Conley*, 2005 U.S. Dist. LEXIS 15468, at *12-13 (“The IPLA effectively supplants [the plaintiff’s] common law claims because all of his claims are brought by a user or consumer against a manufacturer for physical harm caused by a product. Plaintiff’s common law claims will therefore be treated as merged into the IPLA claims.”); *Bourne*, 2005 U.S. Dist. LEXIS 15467, at *9 n.2 (“[P]laintiffs may not pursue a separate common law negligence claim [for design defect]. Their negligence claim is not dismissed but is more properly merged with the statutory claim under the IPLA, which includes elements of negligence.”), *aff’d*, 452 F.3d 632 (7th Cir. 2006); see also *Miller v. Honeywell Int’l Inc.*, No. IP 98-1742 C-M/S, 2002 U.S. Dist. LEXIS 20478, at *38 (S.D. Ind. Oct. 15, 2002), *aff’d*, 2004 U.S. Dist. LEXIS 15261 (7th Cir. July 26, 2004); *Burt v. Makita, USA, Inc.*, 212 F. Supp. 2d 893, 899-900 (N.D. Ind. 2002); *Birch v. Midwest Garage Door Sys.*, 790 N.E.2d 504, 518 (Ind. Ct. App. 2003).

just as in any other negligence case, a claimant advancing design or warning defect theories must satisfy the traditional negligence requirements—duty, breach, injury, and causation.⁸⁷

Despite the IPLA's unambiguous language and several years worth of authority recognizing that "strict liability" applies only in cases involving alleged manufacturing defects, some courts unfortunately continue to employ the term "strict liability" when referring to IPLA claims, even when those claims allege warning and design defects and clearly accrued after the 1995 IPLA amendments took effect.⁸⁸ That disturbing trend continued in the 2008 survey period, as demonstrated by the case of *Kovach v. AlphaPharma, Inc.*,⁸⁹ in which the parents of a child who died from an overdose of codeine following surgery sued the manufacturers and sellers of the cup used to dispense the codeine.⁹⁰ The Indiana Supreme Court granted transfer in *Kovach* on February 27, 2009. We nevertheless analyze the decision in this Survey because the issues involved may be important to Indiana judges and practitioners as they await a decision from the Indiana Supreme Court.

In *Kovach*, the child's parents asserted, among other claims, an IPLA-based "strict liability in tort" claim and an IPLA-based "negligence" claim against the cup manufacturer and seller.⁹¹ The trial court granted summary judgment to the cup manufacturer and seller as to each of the claims, presumably because it found insufficient evidence to sustain a verdict that the cup was defective and/or unreasonably dangerous.⁹²

Although the *Kovach* majority opinion indicates that the plaintiffs chose "to

87. *E.g.*, *Conley*, 2005 U.S. Dist. LEXIS 15468, at *13-14 ("To withstand summary judgment, [the plaintiff] must come forward with evidence tending to show: (1) [the defendant] had a duty to warn the ultimate users of its sling that dull or rounded load edges could cut an unprotected sling; (2) the hazard was hidden and thus the sling was unreasonably dangerous; (3) [the defendant] failed to exercise reasonable care under the circumstances in providing warnings; and (4) [the defendant's] alleged failure to provide adequate warnings was the proximate cause of his injuries.").

88. *See, e.g.*, *Whitted v. Gen. Motors Corp.*, 58 F.3d 1200, 1206 (7th Cir. 1995); *Burt*, 212 F. Supp. 2d at 900; *see also* *Fellner v. Phila. Toboggan Coasters, Inc.*, No. 3:05-CV-218-SEB-WGH, 2006 WL 2224068, at *1, *4 (S.D. Ind. Aug. 2, 2006); *Cincinnati Ins. Cos. v. Hamilton Beach/Proctor-Silex, Inc.*, No. 4:05 CV 49, 2006 WL 299064, at *2-3 (N.D. Ind. Feb. 7, 2006); *Vaughn v. Daniels Co. (W. Va.), Inc.*, 841 N.E.2d 1133, 1138 (Ind. 2006).

89. 890 N.E.2d 55 (Ind. Ct. App. 2008), *trans. granted*, (Ind. Feb. 27, 2009).

90. *Id.* at 61.

91. *Id.*

92. *Id.* We presume from the surrounding context that the trial court so found. Because the court of appeals described the trial court as having "summarily" granted summary judgment without any findings of fact or conclusions of law, *id.* at 65, the opinion is devoid of specific reasoning for the trial court's decision to grant summary judgment. We also note here that the cup manufacturers and sellers cross-appealed, arguing that the trial court erred by denying a motion to exclude the opinion testimony of plaintiffs' expert witness. *Id.* at 61. The court's discussion of that issue is addressed *infra* Part I.D.1.

proceed under both the theory of strict liability in tort and negligence,”⁹³ there is no indication in the opinion that the operative theory for proving product defect was anything other than failure to warn. The opinion addresses only claims alleging failure to warn.⁹⁴ If, indeed, it is true that plaintiffs were not pursuing a manufacturing defect theory in the trial court, then there is simply no operative theory in the case to which strict liability would have applied because, as noted above, Indiana Code sections 34-20-2-1 and 34-20-2-2 make it clear that only manufacturing defect theories are subject to strict liability.⁹⁵

This Survey addresses in detail a handful of cases in which plaintiffs attempted to demonstrate products were defective and unreasonably dangerous by utilizing warning, design, and manufacturing defect theories.

1. Warning Defect Theory.—The IPLA contains a specific statutory provision covering the warning defect theory, which reads as follows:

A product is defective . . . if the seller fails to:

- (1) properly package or label the product to give reasonable warnings of danger about the product; or
- (2) give reasonably complete instructions on proper use of the product; when the seller, by exercising reasonable diligence, could have made such warnings or instructions available to the user or consumer.⁹⁶

In failure to warn cases, the “unreasonably dangerous” inquiry is essentially the same as the requirement that the defect be latent or hidden.⁹⁷

Indiana courts have been active in recent years in deciding cases espousing warning defect theories. Some of those cases include: *Ford Motor Co. v.*

93. *Kovach*, 890 N.E.2d at 66.

94. *Id.* at 66-67.

95. Although this point is made in more detail below, *see infra* Part I.D.1, it also bears pointing out here that the majority’s opinion ultimately concludes that the cup “was defective in its design by failing to include a warning.” *Kovach*, 890 N.E.2d at 67. That statement is confusing and unfortunate. As described above, failure to warn and improper design are two different theories, each of which can be used independently to establish that a product was in a defective condition for purposes of the IPLA. Under the IPLA, a product that is judged not to contain an appropriate warning is not, by virtue of that fact alone, a defectively designed product. As also described below, the elements required in Indiana to prove a design defect theory under the IPLA are different from those required to prove a failure to warn theory.

96. IND. CODE § 34-20-4-2 (2008); *see also* *Deaton v. Robison*, 878 N.E.2d 499, 501-03 (Ind. Ct. App. 2007), *trans. denied*, 891 N.E.2d 49 (Ind. 2008); *Coffman v. PSI Energy, Inc.*, 815 N.E.2d 522, 527 (Ind. Ct. App. 2004) (both noting the standard for proving a warning defect case).

97. *See* *First Nat’l Bank & Trust Corp. v. Am. Eurocopter Corp. (Inlow II)*, 378 F.3d 682, 690 n.5 (7th Cir. 2004). For a more detailed analysis of *Inlow II*, *see* Joseph R. Alberts, *Survey of Recent Developments in Indiana Product Liability Law*, 38 IND. L. REV. 1205, 1221-27 (2005).

Rushford;⁹⁸ *Tober v. Graco Children's Products, Inc.*;⁹⁹ *Williams v. Genie Industries, Inc.*;¹⁰⁰ *Conley v. Lift-All Co.*;¹⁰¹ *First National Bank & Trust Corp. v. American Eurocopter Corp. (Inlow II)*;¹⁰² and *Birch v. Midwest Garage Door Systems*.¹⁰³

The 2008 survey period revealed that federal and state courts in Indiana are as busy as ever when it comes to addressing issues in cases involving allegedly defective warnings and instructions. Indeed, three cases are noteworthy here.

98. 868 N.E.2d 806 (Ind. 2007). For more detailed discussion and commentary about *Rushford*, see Joseph R. Alberts, James Petersen & Robert B. Thornburg, *Survey of Recent Developments in Indiana Product Liability Law*, 41 IND. L. REV. 1165, 1184-87 (2008).

99. 431 F.3d 572 (7th Cir. 2005). For more detailed discussion and commentary about *Tober*, see Joseph R. Alberts & James Petersen, *Survey of Recent Developments in Indiana Product Liability Law*, 40 IND. L. REV. 1007, 1028-30 (2007).

100. No. 3:04-CV-217 CAN, 2006 WL 1408412 (N.D. Ind. May 19, 2006). For more detailed discussion and commentary about *Williams*, see Alberts & Petersen, *supra* note 99, at 1032-33.

101. No. 1:03-cv-01200-DFH-TAB, 2005 U.S. Dist. LEXIS 15468 (S.D. Ind. July 25, 2005).

102. *Inlow II*, 378 F.3d 682, *aff'g In re Inlow Accident Litig. (Inlow I)*, No. IP 99-0830-C H/K, 2002 U.S. Dist. LEXIS 8318 (S.D. Ind. Apr. 16, 2002). In the *Inlow* cases, a helicopter rotor blade struck and killed the Consec general counsel, Lawrence Inlow, as he passed in front of the helicopter after disembarking. *Id.* at 685. Because of the helicopter's high-set rotor blades, the court determined as a matter of law that the deceleration-enhanced blade flap was a hidden danger of the helicopter and that the manufacturer had a duty to warn its customers of that danger. *Id.* at 691. The court ultimately held, however, that the manufacturer satisfied its duty to warn Consec and Inlow as a matter of law in light of the sophisticated intermediary doctrine. *Id.* at 692-93.

103. 790 N.E.2d 504 (Ind. Ct. App. 2003). In *Birch*, a young girl sustained serious injuries when the garage door closed on her. *Id.* at 508. The court concluded that the garage door system at issue was not defective and that a change in an applicable federal safety regulation, in and of itself, does not make a product defective. *Id.* at 518. Additionally, the court concluded that there was no duty to warn plaintiffs about changes in federal safety regulations because the system manual the plaintiffs received included numerous warnings regarding the type of system installed and that no additional information about garage door openers would have added to the plaintiffs' understanding of the characteristics of the product. *Id.* at 518-19. For a more detailed analysis of *Birch*, see Joseph R. Alberts & Jason K. Bria, *Survey of Recent Developments in Indiana Product Liability Law*, 37 IND. L. REV. 1247, 1262-64 (2004); *see also* *Burt v. Makita USA, Inc.*, 212 F. Supp. 2d 893 (N.D. Ind. 2002) (rejecting plaintiff's argument that a saw should have had warning labels making it more difficult for the saw guard to be left in a position where it appeared installed when in fact it was not; the scope of the duty to warn is determined by the foreseeable users of the product and there was no evidence that the circumstances of plaintiff's injuries were foreseeable such that defendants had a duty to warn against those circumstances); *McClain v. Chem-Lube*, 759 N.E.2d 1096 (Ind. Ct. App. 2001) (holding that the trial court should have addressed whether the risks associated with use of a product were unknown or unforeseeable and whether the defendants had a duty to warn of the dangers inherent in the use of the product, because designated evidence showed that both defendants knew that the product at issue was to be used in conjunction with high temperatures that occurred as a result of the hot welding process). For a more detailed analysis of *Burt* and *McClain*, see Alberts & Boyers, *supra* note 23, at 1183-85.

In the first case, *Deaton v. Robison*,¹⁰⁴ a panel of the Indiana Court of Appeals affirmed a trial court's judgment in favor of the manufacturer of a black powder rifle that the plaintiff alleged to be defective and unreasonably dangerous.¹⁰⁵ Plaintiff James Deaton and his friend, Justin Robison, were in Robison's garage on December 1, 2002, preparing to go deer hunting.¹⁰⁶ Robison owned a black powder rifle manufactured by defendant Knight Rifles, Inc.¹⁰⁷ Robison realized that his rifle was still loaded from the previous day's hunt.¹⁰⁸ Robison acknowledged the danger that would be posed by transporting a loaded rifle, telling Deaton, "I've got to unload this before I kill somebody."¹⁰⁹ As Robison tried to unload the rifle, the bolt slipped and it accidentally fired.¹¹⁰ The discharged round struck Deaton in the leg.¹¹¹ Although the rifle was equipped with two safeties, only one of them—a trigger safety—was engaged at the time of the shooting.¹¹² According to the court, "[t]he rifle would not have fired at all had both safeties been engaged."¹¹³

Deaton and his wife sued both Robison and Knight, "alleging that Robison was negligent in shooting Deaton and that Knight was negligent in failing to adequately warn of the dangers associated with the [rifle]."¹¹⁴ At trial, the court granted Knight's motion for judgment on the evidence, concluding that there was insufficient evidence to sustain a verdict that Knight's warnings were inadequate.¹¹⁵ Specifically, Knight argued that a product must be found to be unreasonably dangerous even if there is arguably sufficient evidence to establish it was in a defective condition.¹¹⁶ The Deatons presented two theories at trial to show that the rifle's operator's manual was inadequate. First, the Deatons contended that the manual failed to warn the user not to let the firing pin rest against a live primer.¹¹⁷ Second, the Deatons asserted that the manual did not instruct about how to unload the rifle.¹¹⁸

In making its case for judgment on the evidence to the trial court, Knight argued that both of plaintiff's theories were subsumed and extinguished because the risk of injury from accidental discharging was manifestly apparent to both

104. 878 N.E.2d 499 (Ind. Ct. App. 2007), *trans. denied*, 891 N.E.2d 49 (Ind. 2008).

105. *Id.* at 500.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.* at 501.

115. *Id.* The trial court also "sustained Knight's objection to the admission into evidence of a manual and instructional video associated with Robison's rifle." *Id.*

116. *Id.* at 502.

117. *Id.* at 503-04.

118. *Id.*

Robison and Deaton under the circumstances.¹¹⁹ Moreover, there was ample evidence to demonstrate that Robison knew how to unload the rifle because he had used it for years and, in fact, when asked if he was “of course aware that if [the firing pin] slipped when you were pulling it back without the safety, there was a risk of it firing,” Robison responded, “Yeah, I . . . I . . . there’s always a risk.”¹²⁰ The evidence at trial demonstrated that if the secondary safety had been engaged, “everything would have been fine.”¹²¹ Indeed, Robison agreed both in his deposition and in his testimony at trial that the manner in which the rifle was stored in his garage—keeping the primer on with the rifle loaded, the projectile cap in place, the jacket on with the hammer resting on it—just before Deaton was shot was “dangerous.”¹²² Robison likewise admitted at trial that trying to remove the primer cap without the secondary safety engaged “is a very dangerous thing to do,” particularly when the rifle was “pointed at someone.”¹²³

Given that evidence, the trial court agreed with Knight’s argument that “there is no need to warn someone if they already know about [the hazard]. A warning would be superfluous or meaningless.”¹²⁴ At the conclusion of trial, the jury found Robison entirely at fault in causing Deaton’s injuries and awarded the Deatons damages.¹²⁵

On appeal the Deatons argued that the trial court erred when it entered judgment in favor of Knight on the issue of inadequate warnings.¹²⁶ The court, in answering the issue, first acknowledged that the case fell “within the provisions of the [IPLA].”¹²⁷ The court also pointed out that the IPLA requires a plaintiff to prove, among other things, both that a product is defective and unreasonably dangerous.¹²⁸ Citing the definition provided by Indiana Code section 34-6-2-146, the court recognized that “unreasonably dangerous” refers to “any situation in which the use of a product exposes the user or consumer to a risk of physical harm to an extent beyond that contemplated by the ordinary consumer who purchases the product with the ordinary knowledge about the

119. *Id.* at 502-04.

120. *Id.* at 503.

121. *Id.* at 502-03.

122. *Id.* at 503.

123. *Id.*

124. *Id.* at 502.

125. *Id.* at 501.

126. *Id.*

127. *Id.* Although making it clear initially that the case “falls within the provisions of the [IPLA],” the *Deaton* opinion also indicates that Indiana has “adopted” section 388 of the Restatement (Second) of Torts, which seeks to impose common law liability upon possessors of defective and unreasonably dangerous chattel. *See Deaton*, 878 N.E.2d at 501. Whether and to what extent section 388 should provide a separate avenue of recovery for the same physical harm suffered by the Deatons is addressed *infra* Part I.E.

128. *Deaton*, 878 N.E.2d at 501 (citing *Coffman v. PSI Energy, Inc.*, 815 N.E.2d 522, 527 (Ind. Ct. App. 2004)).

product's characteristics common to the community of consumers."¹²⁹

As they did in the trial court, the Deatons contended on appeal that the dangerous and defective condition the rifle presented was its ability to fire even with one of the safeties engaged.¹³⁰ They also argued that there was "no evidence that Robison appreciated the specific danger that the gun could fire with the trigger safety engaged."¹³¹ The court of appeals disagreed, pointing to evidence showing that Robison, indeed, "fully appreciated the danger of unloading the gun in the presence of others and that he knew engaging the secondary safety would have prevented the shooting."¹³² The court continued:

It is undisputed that Robison appreciated the danger inherent in handling a loaded rifle and in unloading a rifle while pointing it at someone If Robison thought the rifle was in a safe condition, loaded, but with the single safety engaged, he would not have been so concerned about unloading it before leaving for the hunting trip. Immediately before the shooting, Robison stated his concern that he might kill someone if he did not unload the rifle before the trip. And Robison testified that having a loaded firearm "in the condition that [he] had it in when [he] took it out of [his] case seconds before Mr. Deaton was shot [namely, with only the trigger safety engaged,]" was a "dangerous thing to do." . . . That evidence shows that Knight reasonably believed that Robison would realize the danger of unloading the rifle while pointing it at someone, regardless of whether one or both safeties were engaged.¹³³

The court of appeals, therefore, concluded that Knight could not be liable for its alleged failure to warn or to provide additional instructions.¹³⁴ Simply stated,

129. *Id.* (citing IND. CODE § 34-6-2-146 (2008)).

130. *Id.* at 503.

131. *Id.*

132. *Id.*

133. *Id.* at 503-04 (citation omitted). The evidence also showed that Robison would not have heeded the specific warning the Deatons contend Knight should have provided. According to the court, "Robison testified that he did not read the manual, and he testified that he probably watched the video, but only to learn how to clean the rifle. And, as previously noted, Robison already knew it was dangerous to point a loaded weapon at someone and did it anyway." *Id.* at 504 n.1.

134. *Id.* at 504. In the unpublished case of *Lind v. Menard, Inc.*, No. 45A04-0707-CV-408, 2008 WL 324018 (Ind. Ct. App. Feb. 7, 2008), another panel of the court of appeals arrived at a different conclusion under a different set of facts. In *Lind*, the customer purchased a drain clearing product from Menards. *Id.* at *1. The customer read the instructions and warnings on the bottle, including the instruction to wear gloves, goggles, and other suitable protective clothing. *Id.* He poured approximately two cups of the drain-clearing product into the drain and waited one hour as the label advised. *Id.* Although the instructions provided that users should allow the product to work overnight for best results and to flush the drain with hot water, Lind used warm water from the bathroom faucet to try to flush the drain. *Id.* When the drain did not open, he went to his basement to remove the cap from the drum trap. *Id.* As he did, the cap exploded and Lind suffered severe eye injuries, burns, and scarring. *Id.* The court reversed the trial court's summary judgment

the rifle did not present an unreasonable or concealed hazard for purposes of the IPLA, but rather a manifest and obvious risk that Robison well-contemplated.¹³⁵ As such, the court of appeals affirmed the trial court’s entry of judgment on the evidence.¹³⁶

The *Deaton* decision tracks almost perfectly the principles espoused in a 2006 Seventh Circuit design defect case, *Bourne v. Marty Gilman, Inc.*,¹³⁷ In that case, the court held that a football goal post that fell and injured a college student during a post-game celebration was not unreasonably dangerous as a matter of law.¹³⁸ Judge David Hamilton granted summary judgment for the goal post manufacturer, determining as a matter of law that the goal post was not unreasonably dangerous because it was obvious to an objective, reasonable person that a goal post collapsing under the weight of celebrating fans poses a risk of serious injury.¹³⁹ Indeed, the manufacturer’s evidence established that the aluminum posts are about forty-feet tall and weigh 470 pounds.¹⁴⁰

The Bournes appealed to the Seventh Circuit, arguing that the “open and obvious” rule cannot bar a claim for defective design under the IPLA, even if a risk is obvious, if they could prove that the goal post manufacturer should have adopted a safer and feasible alternative design.¹⁴¹ The Seventh Circuit ultimately agreed that Judge Hamilton’s ruling was sound, although it found it more accurate to state that the goal post was not unreasonably dangerous as a matter of law, rather than declaring that the danger posed by it was “obvious as a matter of law.”¹⁴² In doing so, the Seventh Circuit made it clear that the case examined whether the product was defective and unreasonably dangerous as a matter of law, not whether the “incurred risk” defense applied as a matter of law.¹⁴³ This is an important distinction because the extent to which a product’s risk is “open” or “obvious” is a critical element in determining both the reasonableness of the danger it presents, and the degree to which a user actually knew of the product’s danger.¹⁴⁴ The former, and not the latter, determination was at issue in *Bourne*.¹⁴⁵

for the defendant even though the label warned about the danger of severe burns. *Id.* at *6. The court reached its decision largely because Lind wore glasses, waited one hour for the product to work before taking action, and did something that the label did not specifically warn him against. *Id.* Under those circumstances, the panel concluded that a jury was entitled the determine the adequacy of the warnings and instructions. *Id.*

135. *Deaton*, 878 N.E.2d at 504.
136. *Id.*
137. 452 F.3d 632 (7th Cir. 2006). For a complete discussion of *Bourne*, see Alberts & Peterson, *supra* note 99, at 1022-26.
138. *Bourne*, 452 F.3d at 633, 638-39.
139. *Id.* at 634-35.
140. *Id.* at 633.
141. *Id.* at 635.
142. *Id.* at 637.
143. *Id.*
144. *Id.*
145. *Id.*

Practitioners and judges in Indiana, therefore, should be mindful that application of the “open and obvious” concept can be used in at least two different ways: (1) in determining whether a product is “unreasonably dangerous” because unreasonable danger depends upon the reasonable expectations of expected users and the obviousness of the risk will eliminate the need for any further protective measures;¹⁴⁶ and (2) in determining whether the “incurred risk” defense¹⁴⁷ applies. Practitioners and judges in Indiana should also recognize that *Deaton* and *Bourne* analyzed the openness and obviousness of a product’s condition and ultimately concluded, as a matter of law, that the products at issue did not present an unreasonable, concealed hazard. Whether the same decision would have been reached as a matter of law in the context of the “incurred risk” statutory defense is a more difficult question because the defense requires a defendant to establish that the user actually knew about the product’s danger.¹⁴⁸ No such requirement exists when the “open and obvious” concept is used to support the argument that a product is not unreasonably dangerous because of the open and obvious nature of the danger it presents. The latter is based upon a “reasonable user expectation” standard, not an actual knowledge standard.

The second of the three significant 2008 cases involving allegedly defective warnings and instructions is the federal district court decision in *Clark v. Oshkosh Truck Corp.*¹⁴⁹ *Clark* involved a plaintiff, Jimmy Clark, who worked as a repossession agent. Clark suffered injuries while trying to repossess a vehicle.¹⁵⁰ The injuries occurred on December 12, 2005, at a time when there was freezing rain and ice on the ground.¹⁵¹ Clark slipped while walking on the raised rollback bed of the truck he used to repossess vehicles, caught his foot in an open-sided rail, and tumbled over the side of the truck.¹⁵² The truck had been exposed to the elements, but Clark said that he did not need to shovel or remove snow, ice, or water from the truck bed.¹⁵³

Clark had worked as a repossession agent for four-and-a-half years and had experience using rollback trucks similar to the one he used on the day of the injury.¹⁵⁴ The truck at issue had slick beds and open-sided rails because those were the specifications that Clark’s employer requested when it purchased the vehicle.¹⁵⁵ Before December 12, 2005, Clark had slipped and fallen on the

146. *Id.*

147. IND. CODE § 34-20-6-3 (2008).

148. *Id.* §§ 34-20-6-3(1)-(2).

149. No. 1:07-cv-0131-LJM-JMS, 2008 WL 2705558, Prod. Liab. Rep. (CCH) ¶ 18,046 (S.D. Ind. July 10, 2008).

150. *Id.* at *1.

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

truck’s bed on two other occasions, but had not suffered any injuries.¹⁵⁶

The operator’s manual and safety video included with the truck at issue instructed users not to drive a vehicle onto the inclined bed.¹⁵⁷ Those materials did not provide any warning against walking on the truck bed, nor did they specify how to unload small vehicles.¹⁵⁸ Regardless, Clark never read the operator’s manuals, nor did he observe any of the instructional materials for any of the vehicles he used.¹⁵⁹ He did, however, receive on-the-job training about the operation of rollback bed trucks from co-workers, who told Clark “to tie down all four corners of a vehicle being towed and to set the parking brake before transporting the vehicle.”¹⁶⁰ Clark’s regular practice was to drive the vehicle to be towed up the inclined ramp.¹⁶¹ Clark’s training also advised that both the front “tie downs” and the parking brake had to be released before unloading a vehicle.¹⁶² According to Clark, “there was no way to release the front tie downs or the parking brake when unloading the vehicle without walking on the inclined bed, particularly if the towed vehicle was a small vehicle.”¹⁶³

Clark and his wife filed suit against the manufacturer of the rollback truck, collectively referred to in the court’s decision as “Jerr-Dan.”¹⁶⁴ Plaintiffs presented two theories under the IPLA. First, plaintiffs asserted that Jerr-Dan “failed to warn of the dangers associated with walking on the rollback bed”¹⁶⁵ and, second, they contended that Jerr-Dan “failed to provide adequate instructions [about] how to operate the rollback bed, especially when the operator is of average size and the vehicle is a mid-size or small.”¹⁶⁶

Jerr-Dan moved for summary judgment, arguing that the rollback truck was not unreasonably dangerous because the danger posed to Clark was open and obvious.¹⁶⁷ Citing to IPLA sections 34-20-2-1, 2-3, 4-1, and 4-2, the court initially recognized that the IPLA governed plaintiffs’ substantive claims regardless of their legal theories and reiterated that the operative theory alleged that the truck was defective because it did not provide adequate warnings or use instructions.¹⁶⁸ The court also recognized that the IPLA requires a plaintiff to prove that: “(1) the product was defective and unreasonably dangerous; (2) the defective condition existed at the time the product left the defendant’s control; and (3) the defective condition was the proximate cause of the plaintiff’s

156. *Id.*
157. *Id.* at *2.
158. *Id.*
159. *Id.* at *1.
160. *Id.*
161. *Id.*
162. *Id.* at *2.
163. *Id.*
164. *Id.* at *1.
165. *Id.* at *4.
166. *Id.*
167. *Id.*
168. *Id.* at *3.

injuries.”¹⁶⁹ As noted above and as Judge McKinney pointed out, the “reasonable consumer expectation” analysis posits that “a product may be defective under the [IPLA] where the manufacturer fails in its duty to warn of a danger or instruct on the proper use of the product as to which the average consumer would not be aware.”¹⁷⁰ For purposes of the application of the IPLA, a product is unreasonably dangerous when it “exposes the user or consumer to a risk of physical harm to an extent beyond that contemplated by the ordinary consumer who purchases the product with the ordinary knowledge about the product’s characteristics common to the community of consumers.”¹⁷¹

The court granted *Jerr-Dan*’s motion with regard to the failure to warn theory, concluding that *Jerr-Dan* “had no duty to warn of any dangers associated with the rollback bed’s open and obvious conditions.”¹⁷² Clark’s prior knowledge about and experience with the type of rollback bed at issue were key to the court’s decision. Indeed, the court noted that Clark was personally aware of the “slick nature” of the rollback bed, having compared the bed to glass and having twice complained about its slippery surface.¹⁷³ Clark argued that “the open and obvious defense [did not] apply because although he knew the bed was slick, he did not expect to fall after he slipped and got his foot stuck under the rail.”¹⁷⁴ The court rejected that argument, determining that “the specific mechanics” of Clark’s fall were “irrelevant because of the plainly visible characteristics of the rollback bed, which [Clark] recognized.”¹⁷⁵

169. *Id.* (citing *Deaton v. Robison*, 878 N.E.2d 499, 501 (Ind. Ct. App. 2007), *trans. denied*, 891 N.E.2d 49 (Ind. 2008)). The court also aptly noted that the “defective condition” analysis “focuses on the product itself” while the “unreasonably dangerous” analysis “focuses on the reasonable expectations of the consumer.” *Id.* (quoting *Welch v. Scripto-Tokai Corp.*, 651 N.E.2d 810, 814 (Ind. Ct. App. 1995)).

170. *Id.* at *4 (quoting *Ford Motor Co. v. Rushford*, 868 N.E.2d 806, 810 (Ind. 2007)). Citing IPLA section 2-2), the *Clark* court also pointed out that actions alleging design defect or failure to warn as the operative theory to prove defectiveness “must establish that the manufacturer or seller failed to exercise reasonable care under the circumstances in designing the product or in providing the warnings or instructions.” *Id.* (quoting IND. CODE § 34-20-2-2 (2008)).

171. *Id.* (quoting IND. CODE § 34-6-2-146 (2008)).

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.* It is worth mentioning that Judge McKinney chose to write that the “open and obvious danger rule applies in products liability claims based on common law negligence.” *Id.* at (citing *Welch v. Scripto-Tokai Corp.*, 651 N.E.2d 810, 815 (Ind. Ct. App. 1995)). That is a correct statement of Indiana law from an historical standpoint. Indeed, the case to which the *Clark* court cites (*Welch*) was decided at a time when Indiana common law provided a separate avenue for pursuing failure-to-warn claims alleging physical harm caused by a product. It is important to point out here that the “open and obvious” danger doctrine is technically no longer a “defense” and practitioners should take care not to apply it in the same manner as it had been applied before the 1995 amendments to the IPLA merged all failure-to-warn claims into the IPLA, thereby extinguishing all separate common law failure-to-warn theories for physical harm caused by a

According to the court, that analysis did not end the inquiry because the plaintiffs also contended that Jerr-Dan failed to provide adequate instructions about the proper and safe use of the rollback bed.¹⁷⁶ With regard to that theory, the court denied Jerr-Dan's summary judgment motion, concluding that plaintiffs had, indeed, designated enough evidence to present their inadequate use instruction theory to the jury.¹⁷⁷ The court pointed to several things that Jerr-Dan's safety video did not address, including: (1) how the winch should be "unwound from its original position"; (2) "how the parking brake [should be] set on a vehicle after it is loaded on the bed"; (3) "how the front tie downs are affixed"; and (4) how each of those procedures should be accomplished when unloading a vehicle from the truck.¹⁷⁸ According to the court, Jerr-Dan did not offer any additional arguments specific to the failure-to-instruct theory, but rather argued that all of plaintiffs' claims fail because any dangers associated with the use of the rollback bed and truck were open and obvious.¹⁷⁹ In rejecting such an argument, the court concluded as follows:

[E]ven if the Court concludes that no features of the rollback bed or truck were concealed, a reasonable jury could still find that an average consumer would not be aware of how to safely perform certain required tasks absent adequate instructions, particularly when a person of average stature attempts to load or unload a mid-size or small vehicle. As such, a reasonable jury could find that Jerr-Dan's inadequate instructions rendered the rollback bed and truck defective and unreasonably dangerous to an average consumer After reviewing both the safety video and operations manual, the Court concludes that the Plaintiffs have presented sufficient evidence to suggest that Jerr-Dan's rollback bed and truck were defective under Indiana Code [section] 34-20-4-2.¹⁸⁰

Clark may prove troublesome to those trying to interpret and apply it because the decision allowed the plaintiffs to proceed to trial on a failure-to-instruct theory despite having made an initial determination that the slippery truck bed and the risk of falling on it was obvious and did not present an unreasonably dangerous condition. As noted above, in cases alleging improper design or inadequate warnings as the theory for proving that a product is in a "defective condition," recent decisions have adopted an approach in which that the substantive defect analysis—whether a design was inappropriate or whether a warning was inadequate—*follows* a threshold analysis that first examines whether, in fact, the product at issue is "unreasonably dangerous."¹⁸¹

product.

176. *Id.* at *5.

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.* (citations omitted).

181. Indeed, in *Bourne v. Marty Gilman, Inc.*, No. 1:03-cv-01375-DFH-VSS, 2005 U.S. Dist. LEXIS 15467 (S.D. Ind. July 20, 2005), *aff'd*, 452 F.3d 632 (7th Cir. 2006) (involving an alleged

In *Clark*, there is little doubt that the slick surface of the rollback truck's bed was the defective condition from which the truck at issue suffered. There seems likewise little doubt that such a condition would have existed under the circumstances even had Jerr-Dan provided a set of instructions about the proper use of the rollback bed and truck. Either they would have instructed users not to walk on the bed (which would have rendered Clark's actions a "misuse") or they presumably would have provided that the user must walk carefully on the bed so as to make the proper adjustments to the vehicle being repossessed. Regardless, the condition of which Clark complained—the slippery bed—would have been unavoidable absent a different set of weather conditions.

The IPLA and recent case law interpreting it seem to suggest that the better approach for courts to take is to first determine whether the defective condition from which the product allegedly suffers would, as a matter of law and under all relevant circumstances, thereby also render it unreasonably dangerous.¹⁸² If not, the inquiry should be at an end even if it is possible that a plaintiff could present sufficient evidence to defeat a summary judgment concerning whether the product could be said to be in a "defective condition."¹⁸³ In that context, the *Clark* decision is peculiar because it reaches the conclusion that the defective condition (the slippery rollback bed) does not render the truck unreasonably dangerous as a matter of law (in light of Clark's prior knowledge and experience with it and the open and obvious nature of the risk presented), yet the court nevertheless resurrected plaintiffs' claim merely because there was arguably sufficient evidence to demonstrate that Jerr-Dan's use instructions could have been better.¹⁸⁴ Following the letter of the IPLA, the jury could find that the truck was in a defective condition, but the court's previous ruling as a matter of law that Clark's knowledge of the open and obvious danger renders the truck not unreasonably dangerous, which, in turn, means that plaintiffs cannot recover.

The *Clark* court determined that "the specific mechanics" of Clark's fall were "irrelevant because of the plainly visible characteristics of the rollback bed, which [Clark] recognized."¹⁸⁵ Under the circumstances and following the precise letter of the IPLA, the specific theory employed by Clark to prove that the truck was in a defective condition should likewise be irrelevant if that condition and the risk it presented already have been determined as a matter of law not to present an unreasonably dangerous condition.

The third significant warnings defect case decided during the 2008 survey period is *Kovach v. Alpharma, Inc.*¹⁸⁶ We briefly mentioned *Kovach* earlier in

design defect) and *Conley v. Lift-All Co.*, No. 1:03-cv-01200-DFH-TAB, 2005 U.S. Dist. LEXIS 15468 (S.D. Ind. July 25, 2005) (involving an alleged warnings defect), Judge Hamilton followed such an approach.

182. *E.g.*, *Bourne v. Marty Gilman, Inc.*, 452 F.3d 632 (7th Cir. 2006).

183. *Id.*

184. *Clark*, 2008 WL 2705558, at *4-5.

185. *Id.* at *4.

186. 890 N.E.2d 55 (Ind. Ct. App. 2008), *trans. granted*, (Ind. Feb. 27, 2009).

this Article¹⁸⁷ because the majority opinion appears to embrace the idea that strict liability attaches to failure to warn theories despite unambiguous language to the contrary in the IPLA.¹⁸⁸ Putting aside that issue for the sake of this discussion, the majority's substantive treatment of the failure to warn claim deserves separate and detailed attention. As noted above, we recognize that the Indiana Supreme Court granted transfer on *Kovach* on February 27, 2009. As of the date of publication of this Survey, the Indiana Supreme Court has not issued a decision.

In *Kovach*, a nine-year-old boy was admitted to an ambulatory surgery center for a scheduled adenoidectomy.¹⁸⁹ After the procedure, while recovering in the Post-Anesthesia Care Unit, a nurse gave the boy Capital of Codeine, an opiate.¹⁹⁰ Later in the day, after being discharged from the surgery center, the boy went into respiratory arrest and was transported to a hospital where he tragically died from asphyxia attributed to an opiate overdose.¹⁹¹

The nurse administering the Capital of Codeine used a graduated, translucent, but not entirely clear, medicine cup.¹⁹² The cup possessed measurement marks on its inside representing milliliters (ml), drams, ounces, teaspoons, tablespoons and cubic centimeters.¹⁹³ These interior measurement marks possessed similar translucency to that of the measuring cup.¹⁹⁴ The young boy was prescribed 15 ml of Capital of Codeine, which was one half of the cup.¹⁹⁵ The administering nurse claimed that she gave the boy 15 ml of the drug as prescribed, but the child's father testified that the 30 ml cup used to dispense the opiate was full when the nurse entered the room and the boy drank its entire contents.¹⁹⁶ An autopsy revealed that the young child's blood contained more than twice the recommended therapeutic level of the prescribed drug.¹⁹⁷

The child's parents sued the manufacturers and sellers of the medicine cup (the Cup Defendants) under theories of breach of implied warranty of merchantability and the implied warranty of fitness for a particular purpose under the Uniform Commercial Code and strict liability in tort and negligence under the IPLA.¹⁹⁸ The Cup Defendants moved for summary judgment.¹⁹⁹ When the plaintiffs responded, they relied in part on an affidavit from a pharmacist.²⁰⁰ The

187. *See supra* Part I.D.

188. *Kovach*, 890 N.E.2d at 66.

189. *Id.* at 60.

190. *Id.* at 60-61.

191. *Id.* at 61.

192. *Id.* at 60-61.

193. *Id.* at 61.

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.*

defendants moved to exclude the plaintiffs' pharmacist's opinions.²⁰¹ The trial court denied the Cup Defendants' motions to exclude the plaintiffs' expert's opinion testimony but summarily granted the Cup Defendants' motions for summary judgment.²⁰²

On appeal the plaintiffs challenged the summary judgment ruling against them.²⁰³ The Cup Defendants defended the ruling and cross appealed the denial of their motions to exclude the opinion testimony of plaintiffs' expert.²⁰⁴ Before turning to the summary judgment ruling, the reviewing court first addressed whether the trial court properly denied the Cup Defendants' motion to exclude the opinion testimony of plaintiffs' expert.²⁰⁵ Although in depth analysis of the reviewing court's treatment of the exclusion of the expert's testimony is unnecessary and beyond the scope of this Article, some comment is needed because the court returns to the expert's opinions throughout the opinion to support its decision on the substantive legal claims.

Plaintiffs' expert was seemingly well-credentialed.²⁰⁶ Relying on his years of training and experience, he opined that children are more sensitive to overdose than adults.²⁰⁷ As a result, when administering medications, and when dispensing opiates in particular, precise medicinal doses are necessary.²⁰⁸ He then posited that the cup at issue was acceptable for use in determining the volume of medications that did not require precise measurement, but "defective and unreasonably dangerous" for precise volume measurements.²⁰⁹ He concluded that the cup's graduated measurement markings lacked clear contrast and insufficient visibility, making the cup lack fitness and possess a defective condition that caused the boy's overdose and subsequent death.²¹⁰

The defendants challenged the admission of plaintiffs' expert's opinion as "lacking any scientific foundation, unreliable and irrelevant."²¹¹ The court agreed that no scientific principles formed the basis of the expert's testimony.²¹²

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.* at 61-64.

206. *See id.* at 63. Plaintiff's expert was a registered pharmacist with over thirty-five years of experience. *Id.* Among other things, he had developed a pharmacy in a pediatric hospital, created a pediatric pharmacy where he assessed and developed a medication system for all aged patients, and developed a drug dispensing system. *Id.* He was also a professor of pharmacy and had taught various medical care providers about safe methods of administering medications in addition to being hired by hospitals and others to evaluate cases of medication errors and how to prevent them. *Id.* at 63-64.

207. *Id.* at 64.

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.*

It reasoned, however, that the opinions were nevertheless admissible because they were reliably based on the expert's observations and the application of his specialized knowledge to such observations.²¹³ The court concluded that the lower court did not err when it denied the Cup Defendants' motion to strike the opinion testimony.²¹⁴

After finding that the lower court had properly denied the Cup Defendants' motion to exclude plaintiffs' expert's opinion testimony, the court of appeals turned to the summary ruling granting the defendants' motions for summary judgment. The plaintiffs argued that the trial court erred and asserted two claims under the Uniform Commercial Code and two claims under the IPLA.²¹⁵ All four theories or claims were based on claims of inadequate warning.²¹⁶

The court first addressed the IPLA claims.²¹⁷ Initially the court noted that the IPLA governs all product liability actions "regardless of the substantive legal theory or theories upon which the action is brought."²¹⁸ Quoting from *Stegemoller v. ACandS, Inc.*²¹⁹ the court next acknowledged that after the 1995 amendments to the IPLA, the IPLA governed product liability claims based on either theories of strict liability or negligence.²²⁰ As mentioned earlier, plaintiffs' claim was that the medicine cup "was defective and unreasonably dangerous [because] it failed to include a warning of the dangers in the Cup's use."²²¹ The court at least tacitly accepted the imprecise framing of the initial IPLA issues when it wrote that the plaintiff had presented both strict liability and negligence claims under the IPLA.²²² As noted above, the IPLA applies a negligence standard to design defect, inadequate warning, and inadequate instruction claims; strict liability only applies to manufacturing defect claims.²²³ Paradoxically, however, in the first section addressing plaintiff's self-styled "strict liability failure to warn claim," the court quotes from Indiana Code section 34-20-2-2,

213. *Id.*

214. *Id.*

215. *Id.* at 64-65.

216. *Id.* Due to the structure of this Survey, the authors acknowledge that the *Kovach* decision and their discussion of it does not fit conveniently or neatly into any single section of this Article. The plaintiffs advanced failure to warn of the risk of imprecise measuring as the factual predicate for each of their four legal theories, the two IPLA based claims, and the two UCC based claims. Thus, the entire decision could be addressed here. However, remaining mindful of the mandate in Indiana Code section 34-20-1-1 that the IPLA applies to all actions regardless of substantive legal theory or theories, the authors have chosen to address the UCC-based theories *infra* Part I.E. Indeed, because of the far-reaching nature of the decision, it is one of the most significant decisions of the 2008 survey period.

217. *Id.* at 65-67.

218. *Id.* (citing IND. CODE § 34-20-1-1 (2008)).

219. 767 N.E.2d 974 (Ind. 2002).

220. *Kovach*, 890 N.E.2d at 66 (citing *Stegemoller*, 767 N.E.2d at 975).

221. *Id.*

222. *Id.*

223. See *supra* Part I.D; see also IND. CODE §§ 34-20-2-1, 2 (2008).

which provides, in pertinent part, that actions for inadequate warnings or instructions require the party making the claim to “establish that the manufacturer or seller failed to exercise reasonable care under the circumstances.”²²⁴ Relying on testimony from plaintiffs’ expert, the court concluded that it “would have been reasonable to include a warning with the [c]up stating that it should be used with caution when dispensing precise doses of medications.”²²⁵ In other words, the Cup Defendants should have included a warning of the dangers of imprecise dosing, this concluding that “the Kovachs established that the [c]up was defective in its design by failing to include a warning.”²²⁶

The court then turned briefly to the plaintiffs’ failure to warn claim based on negligence.²²⁷ Because it had included its negligence analysis in the “strict liability” section of the decision, the court quickly penned that the negligent failure to warn claim survived for the same reasons it concluded genuine issues of fact remained to prevent the entry of summary judgment on the strict liability failure to warn claim.²²⁸

After addressing the UCC claims²²⁹ the court addressed the issue of causation.²³⁰ The court recognized that the plaintiffs had to prove a causal link between the cup’s defective condition and the child’s death.²³¹ To establish causation, plaintiffs relied on Indiana’s heeding presumption.²³² They argued that because the boy was supposed to receive 15ml, one-half of the cup, and instead received 30ml, a full cup, an appropriate warning not to use the cup to dispense precise measurements of medications to children would have been read and heeded.²³³ The absence of the warning, they argued, created a presumption of causation.²³⁴ The court discussed several Indiana cases,²³⁵ all of which involved the manufacturer not warning or providing inadequate warnings of the specific risk that caused the injury to the plaintiff.²³⁶ The court analogized each to the Cup Defendants’ failure to warn not to use the cup to dispense precise

224. *Kovach*, 890 N.E.2d at 66 (quoting IND. CODE § 34-20-2-2 (2008)).

225. *Id.* at 67.

226. *Id.* That sentence is problematic and confusing because, as discussed above, failure to warn and defective design are two separate and distinct legal theories under the IPLA.

227. *Id.*

228. *Id.*

229. For a complete discussion and analysis of the UCC claims, see *infra* Part I.E.

230. *Kovach*, 890 N.E.2d at 70-71.

231. *Id.* at 67, 70.

232. *Id.* at 71.

233. *Id.*

234. *Id.*

235. *Summit Bank v. Panos*, 570 N.E.2d 960, 968 (Ind. Ct. App. 1991), *abrogated on other grounds by Vergara v. Doan*, 593 N.E.2d 185 (Ind. 1992); *Jarrell v. Monsanto Co.*, 528 N.E.2d 1158, 1168 (Ind. Ct. App. 1988); *Ortho Pharm. Corp. v. Chapman*, 388 N.E.2d 541, 555 (Ind. App. 1979).

236. *Kovach*, 890 N.E.2d at 71.

medicinal doses to children (the risk of overdose), which caused the boy's death.²³⁷

Chief Judge Baker dissented from the majority's opinion with respect to causation.²³⁸ He concluded that the plaintiffs failed to establish that the nurse who administered the overdose did so as a result of imprecise measuring.²³⁹ Since the boy's death was caused by the nurse administering at least a double dosage of the drug, he wrote that no reasonable fact finder could conclude that the nurse's actions were the result of a measuring error.²⁴⁰ Because the failure to warn of imprecise measurements was not the cause of the child's death, Judge Baker concluded that the entry of summary judgment for the Cup Defendants should have been affirmed.²⁴¹

There is much about the *Kovach* decision that is worthy of discussion. The two most significant parts of the decision are the majority's treatment of the failure-to-warn claim as one involving strict liability and its treatment of the UCC-based claims involving personal injury. The UCC claim is addressed separately below.²⁴² With regard to the failure-to-warn claim, and despite noting that a plaintiff in a failure-to-warn case has the burden of establishing that a manufacturer failed to exercise reasonable care under the circumstances when providing warnings or instructions to a consumer (a negligence standard), *Kovach* can be read as creating a new theory of strict liability for failure-to-warn. As discussed above, the unambiguous language contained in Indiana Code section 34-20-2-2 mandates the application of a negligence standard.²⁴³ Thus, since 1995, a negligence standard should be applied to all claims of inadequate warning or instruction.²⁴⁴ If the court of appeals intended to create a new strict liability-based failure to warn claim, Indiana Code section 34-20-2-2 has been dramatically changed, if not completely eviscerated. If a strict liability-based failure to warn claim is allowed to exist, the reasonableness of the warning given or that the decision not to give a warning will no longer be an issue. Instead, all that remains to be proven is that no warning was given or the warning was inadequate. Once these predicates are established, the manufacturer or seller would then be subject to strict liability. Simply stated, it is virtually impossible to reconcile the *Kovach* decision with Indiana Code section 34-20-2-2.

237. *Id.*

238. *Id.* at 72-73 (Baker, C.J., dissenting).

239. *Id.* at 72.

240. *Id.*

241. *Id.* at 73.

242. *See infra* Part I.E.

243. *See supra* Part I.D.; *see also* IND. CODE § 34-20-2-2 (2008).

244. Indeed, a negligence standard was applied to warning claims even prior to tort reform. *See, e.g.,* Natural Gas Odorizing, Inc. v. Downs, 685 N.E.2d 155, 163 n.11 (Ind. Ct. App. 1997) (noting "no doctrinal distinction between negligence and strict liability failure-to-warn actions under the Restatement"); Jarrell v. Monsanto Co., 528 N.E.2d 1158, 1166 (Ind. Ct. App. 1988) ("In Indiana, the issue of the adequacy of warnings in a strict liability case is governed by the same concepts as in negligence.").

2. *Design Defect Theory*.—Decisions that address substantive design defect allegations in Indiana require plaintiffs to prove the existence of what practitioners and judges often refer to as a “safer, feasible alternative” design.²⁴⁵ Plaintiffs must demonstrate that another design not only could have prevented the injury, but that the alternative design was effective, safer, more practicable, and more cost-effective than the one at issue.²⁴⁶ One panel of the Seventh Circuit (Judge Easterbrook writing) has described that “a design-defect claim in Indiana is a negligence claim, subject to the understanding that negligence means failure to take precautions that are less expensive than the net costs of accidents.”²⁴⁷ Stated in a slightly different way, “[t]he [p]laintiff bears the burden of proving a design to be unreasonable, and must do so by showing there are other safer alternatives, and that the costs and benefits of the safer design make it unreasonable to use the less safe design.”²⁴⁸

Indiana’s requirement of proof of a safer, feasible alternative design is similar to what a number of other states require in the design defect context. Indeed, that requirement is reflected in Section 2(B) of the Restatement (Third) of Torts and the related comments.²⁴⁹

In the specific context of the IPLA, it is clear that design defects in Indiana are judged using a negligence standard.²⁵⁰ As such, a claimant can hardly find a manufacturer negligent for adopting a particular design unless he or she can prove that a reasonable manufacturer in the exercise of ordinary care would have adopted a different and safer design. The claimant must prove that the safer, feasible alternative design was in fact available and that the manufacturer unreasonably failed to adopt it.²⁵¹

245. In cases alleging improper design to prove that a product is in a “defective condition,” the substantive defect analysis may need to follow a threshold “unreasonably dangerous” analysis if one is appropriate. *See, e.g., Bourne v. Marty Gilman, Inc.*, No. 1:03-cv-01375-DFH-VSS, 2005 U.S. Dist. LEXIS 15467, at *10-20 (S.D. Ind. July 20, 2005), *aff’d*, 452 F.3d 632 (7th Cir. 2006).

246. *See Whitted v. Gen. Motors Corp.*, 58 F.3d 1200, 1206 (7th Cir. 1995); *Burt v. Makita USA, Inc.*, 212 F. Supp. 2d 893, 900 (N.D. Ind. 2002).

247. *McMahon v. Bunn-o-matic Corp.*, 150 F.3d 651, 657 (7th Cir. 1998).

248. *Westchester Fire Ins. v. Am. Wood Fibers, Inc.*, No. 2:03-CV-178-TS, 2006 WL 3147710, at *5 (N.D. Ind. Oct. 31, 2006) (citing *Bourne*, 452 F.3d at 638). Another recent Seventh Circuit case postulates that a design defect claim under the IPLA requires applying the classic formulation of negligence: B [burden of avoiding the accident] < P [probability of the accident that the precaution would have prevented] L [loss that the accident if it occurred would cause]. *See Bourne*, 452 F.3d at 637; *see also United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947) (referencing Judge Learned Hand’s articulation of the “B<PL” negligence formula).

249. RESTATEMENT (THIRD) OF TORTS § 2(B) (1998).

250. IND. CODE § 34-20-2-2 (2008); *see also Westchester Fire Ins.*, 2006 WL 3147710, at *5; *Bourne*, 452 F.3d at 637.

251. To excuse that requirement would be tantamount to excusing the reasonable care statutory component of design defect liability. By way of example, a manufacturer could not be held liable under the IPLA for adopting design “A” unless there was proof that through reasonable care the manufacturer would have instead adopted design “B.” To make that case, a claimant must show the

In addition, the IPLA adopts “comment k” of the Restatement (Second) of Torts for all products and, by statute, “[a] product is not defective . . . if the product is incapable of being made safe for its reasonably expectable use, when manufactured, sold, handled, and packaged properly.”²⁵² Thus, a manufacturer technically cannot make the “comment k” statutory defense available until and unless the claimant demonstrates a rebuttal. That raises interesting questions in light of Indiana’s quirky treatment of Trial Rule 56 under *Jarboe v. Landmark Community Newspapers of Indiana, Inc.*²⁵³ In federal court, under a *Celotex*²⁵⁴ standard, a manufacturer may file a summary judgment motion based upon the “comment k” defense, challenging the claimant to rebut the defense through properly designated proof of feasible alternative design. Under Indiana’s treatment of Rule 56, however, the manufacturer bears the burden of affirmatively showing the unavailability of the safer, feasible alternative design.²⁵⁵ Regardless of the procedure governing the motion itself, the claimant still must prove the existence of a safer, feasible alternative design to rebut the IPLA’s “comment k” defense.²⁵⁶

The Indiana Supreme Court in *Schultz v. Ford Motor Co.*²⁵⁷ endorsed the foregoing burden of proof analysis in design defect claims in Indiana.²⁵⁸ State and federal courts applying Indiana law have issued several important decisions in recent years that address design defect claims.²⁵⁹ The 2008 survey period

availability of design “B” as an evidentiary predicate to establish before proceeding to the other “reasonable care” elements.

252. IND. CODE § 34-20-4-4 (2008).

253. 644 N.E.2d 118 (Ind. 1994).

254. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

255. IND. TRIAL R. 56.

256. *See, e.g., Bourne v. Marty Gilman, Inc.*, 452 F.3d 632, 637 (7th Cir. 2006); *McMahon v. Bunn-o-matic Corp.*, 150 F.3d 651, 657 (7th Cir. 1998); *Whitted v. Gen. Motors Corp.*, 58 F.3d 1200, 1206 (7th Cir. 1995); *Westchester Fire Ins. Co. v. Am. Wood Fibers, Inc.*, No 2:03-CV-178-TS, 2006 WL 3147710, at *5 (N.D. Ind. Oct. 31, 2006); *Burt v. Makita USA, Inc.*, 212 F. Supp. 2d 893, 900 (N.D. Ind. 2002).

257. 857 N.E.2d 977 (Ind. 2006).

258. *Id.* at 985 n.12 (“For a discussion of the burden of proof at summary judgment in a design defect claim, see Joseph R. Alberts et al., *Survey of Recent Developments in Indiana Product Liability Law*, 39 IND. L. REV. 1145, 1158-60 (2006).”).

259. *See, e.g., Bourne*, 452 F.3d 632, 633, 638-39 (holding that a football goal post that fell and injured a college student during a post-game celebration was not unreasonably dangerous as a matter of law). *Bourne* is a significant decision for Indiana product liability practitioners because it reinforces at least four important precepts: (1) “defective condition” and “unreasonably dangerous” are not interchangeable terms; (2) the concept of “open and obvious” remains relevant in Indiana product liability law even though it is no longer a stand-alone defense; (3) whether a product presents an unreasonable danger can and should, under the proper circumstances, be decided by a judge as a matter of law; and (4) a claimant’s expert testimony must be sufficient, even at summary judgment stage, to satisfy Indiana’s safer, feasible alternative design requirement in cases in which the claimant pursues a design defect claim. *See generally id.*; *see also Westchester*

produced a couple of additional cases to add to the scholarship in this area.

In the first of the 2008 design defect cases, *Mesman v. Crane Pro Services*,²⁶⁰ plaintiff John Mesman worked in a plant owned and operated by a company called Infra-Metals. Infra-Metals manufactured steel products.²⁶¹ Mesman suffered serious leg injuries when a load of steel sheets fell on him while he was unloading the sheets from a railcar at the Infra-Metals plant.²⁶² The plant used a crane to unload steel sheets from railcars.²⁶³ The crane had a beam that was fastened to the plant's ceiling directly above the rail siding.²⁶⁴ The crane also had a hoist, suspended from the beam, which the operator could move up and down and sideways along the beam.²⁶⁵ In addition, the crane had a "spreader beam" connected to the hoist, as well as chains connecting each end of the spreader beam to "scoops" for gripping loads.²⁶⁶ An operator's cab was attached to the beam on the ceiling.²⁶⁷

Before the accident, Infra-Metals hired Konecranes to rebuild the then fifty-year-old crane.²⁶⁸ Konecranes evaluated the design and operation of the crane and made several changes. First, it supplemented the controls in the operator's cab with a hand-held remote-control device that the operator could use to control the crane from the ground.²⁶⁹ "To raise the load the operator would press the up button on the remote and to lower if he [or she] would press the down button."²⁷⁰ Second, Konecranes installed alongside the "up" and "down" buttons on the remote-control device an emergency stop button, which the operator could press if he or she "sensed an impending collision between the load and the cab."²⁷¹ The operator could also reverse the direction of the hoist by pressing the "down"

Fire Ins., 2006 WL 3147710 (dismissing design defect claim based on allegations that a defectively designed wood flour product spontaneously combusted and caused a fire because the plaintiff presented no evidence showing there was a safer, reasonably feasible alternative); *Lytle v. Ford Motor Co.*, 814 N.E.2d 301 (Ind. Ct. App. 2004) (holding, inter alia, that the theories offered by plaintiffs' opinion witnesses regarding the inadvertent unlatching of a seatbelt were not reliable and that designated evidence failed to show that Ford's seatbelt design was defective or unreasonably dangerous); *Baker v. Heye-Am.*, 799 N.E.2d 1135 (Ind. Ct. App. 2003) (holding that fact issues precluded summary judgment with respect to whether the placement of, and lack of a guard for, a maintenance stop button rendered a glass molding machine defective or unreasonably dangerous or both).

260. 512 F.3d 352 (7th Cir. 2008).

261. *Id.* at 353.

262. *Id.*

263. *Id.*

264. *Id.*

265. *Id.*

266. *Id.*

267. *Id.*

268. *Id.*

269. *Id.*

270. *Id.*

271. *Id.*

button on the remote.²⁷² Because, however, the “up” and “down” control had a deceleration feature to reduce wear and tear on the crane, the spreader beam would continue to rise for three seconds after the “down” button was pressed.²⁷³ In those three seconds, the beam would still travel about a foot until it stopped and began moving downward.²⁷⁴ Accordingly, pressing the “down” button would not stop the upward motion as fast as pressing the emergency stop button.²⁷⁵

Even with these alterations, when a boxcar was located underneath the section of the ceiling beam to which the cab was attached, “there was only a foot or two of clearance between the rim of the boxcar and the cab overhead.”²⁷⁶ As such, the possibility existed that a load of steel could be jarred loose and could fall on anyone standing beneath it if the spreader beam struck the cab while the hoist was lifting it.²⁷⁷

On the day of the accident, the crane operator was standing about twenty feet away from a boxcar that was underneath the empty cab.²⁷⁸ Mesman was standing in the boxcar as he fastened a load of steel sheets to the scoops beneath the crane’s spreader beam.²⁷⁹ The operator pressed the “up” button on the remote.²⁸⁰ As the beam and the load rose, the operator saw that the spreader beam was going to hit the cab; however, instead of pressing the emergency-stop button (which would have brought the load to a dead stop), he pressed the “down” button.²⁸¹ Because of the deceleration feature, the beam continued to rise for several seconds, hitting the cab, and causing the load to fall on Mesman.²⁸²

Mesman and his wife sued Konecranes. A jury initially determined that the crane operator’s mistake was the principal cause of the accident, assigning two-thirds of the responsibility for the accident to Infra-Metals.²⁸³ The jury also found that Konecranes’ renovated crane design contributed to the accident,

272. *Id.*

273. *Id.*

274. *Id.*

275. *Id.* Konecranes also added a limit switch that would automatically stop the spreader beam when it came too close to the beam in the ceiling. *Id.* The switch was set to prevent the spreader from touching that beam only when the cab was not directly over the spreader. *Id.* That was the case because the floor of the cab was lower than the beam from which it hung. *Id.* To prevent the spreader from touching the cab when directly underneath it, the limit would have had to be set lower than would permit convenient unloading of boxcars that were underneath any other section of the beam. *Id.* at 353-54. Accordingly, the limit switch could not prevent a collision between the load and the cab. *Id.* at 354.

276. *Id.* at 353.

277. *Id.*

278. *Id.* at 354.

279. *Id.*

280. *Id.*

281. *Id.*

282. *Id.*

283. *Id.* at 353. The plaintiffs could not join Infra-Metals in the suit because the company was Mesman’s employer. *Id.*

assigning one-third of the responsibility to Konecranes.²⁸⁴ The jury awarded the Mesmans a large verdict, but the trial judge set it aside and entered judgment for Konecranes.²⁸⁵ The trial judge alternatively decided that Konecranes was, at the very least, entitled to a new trial because the jury had been “confused by irrelevant evidence and had ignored critical instructions.”²⁸⁶ In the first appeal, the Seventh Circuit reversed the entry of judgment for Konecranes because, under the circumstances, it did not believe that the verdict for Mesman was unreasonable.²⁸⁷ The Seventh Circuit affirmed, however, the trial judge’s decision to grant Konecranes a new trial.²⁸⁸ The parties retried the case and the jury returned a defense verdict for Konecranes.²⁸⁹ The magistrate judge presiding at the retrial refused to set the verdict aside and the Mesmans appealed.²⁹⁰

The court devoted a significant amount of attention in its opinion to a critique of the crane’s design and possible alternatives. According to the *Mesman* court, the accident would have been avoided if Konecranes had removed the cab or eliminated the deceleration feature.²⁹¹ The court also provided another possible alternative design that the parties did not discuss—an “electronic eye or other electronic sensor that would have stopped the hoist automatically when the spreader beam was dangerously close to the underside of the cab.”²⁹² Konecranes recommended at least one of the alternatives—removal of the cab—to Infra-Metals, but Infra-Metals declined “because it wanted the option of being able to operate the crane from within the cab.”²⁹³ The court also noted that eliminating the deceleration feature on the remote control or decreasing the period of deceleration were not “ideal” solutions because the crane would “wear out sooner.”²⁹⁴

As the Seventh Circuit has in recent Indiana design defect cases, the *Mesman* panel confirmed its adherence to the “Learned Hand negligence” formula, positing that “risk of injury has to be weighed against the cost of averting it.”²⁹⁵ Specifically, the court noted,

In Judge Learned Hand’s negligence formula, failure to take a precaution is negligent only if the cost of the precaution (what Judge Hand called

284. *Id.*

285. *Id.*

286. *Id.*

287. *See id.* at 355.

288. *Id.* at 356.

289. *Id.* at 353.

290. *Id.*

291. *Id.* at 354. The accident might also have been avoided had Konecranes “modified the limit switch so that the limit could be lowered when a load was being unloaded beneath the cab.” *Id.*

292. *Id.*

293. *Id.*

294. *Id.* at 355.

295. *Id.* at 354.

the 'burden' of avoiding the accident) is less than the probability of the accident that the precaution would have prevented multiplied by the loss that the accident if it occurred would cause (i.e., $B < PL$).²⁹⁶

Put another way, "the cheaper the precaution, the greater the risk of accident; likewise, the greater the harm caused by the accident, the likelier it is that the failure to take the precaution was negligent."²⁹⁷

One of the principal bases of the second appeal was the presiding judge's refusal to instruct the jury about the "Learned Hand negligence formula."²⁹⁸ The particular instruction offered by plaintiffs was as follows:

If you find that in renovating the crane the defendant failed to take effective precautions less expensive than the damages which [sic] could reasonably be expected to result from the crane's foreseeable use or misuse, then you may find the defendant negligent. Even if you determine that the particular failure which [sic] occurred was not likely to occur, you may still find the defendant liable if the costs of preventing the harm were lower than the costs of a reasonably foreseeable injury.²⁹⁹

The Seventh Circuit disagreed that the instruction should have been tendered, recognizing that the judge instead "gave the standard Indiana pattern instruction on negligence, a correct statement of Indiana law that a federal court in a diversity suit is bound by."³⁰⁰ The court explained that the instruction the plaintiffs offered was not really the "Hand formula," but rather a "garbled version of it."³⁰¹ On this point, the court wrote:

The Hand formula requires, as we have seen, discounting (multiplying) the harm if an accident should occur by the probability that it would occur unless a precaution were taken, and then comparing the product of that multiplication to the cost of the precaution. Thus, if the harm from the accident would be very great and the cost of preventing it very low, the defendant might be negligent even if the probability of the accident was also low. That may be this case. Suppose the probability (P in Hand's formula) were .001, the loss if the accident occurred (L) \$1 million, and the cost of avoiding the accident (B , for burden of precaution) \$500. Then because \$500 is less than \$1 million \times .001 ($=\$1,000$), the injurer would be adjudged negligent. (The numbers in the example are merely illustrative, of course.) But this was not what the proposed instruction would have directed the jury to consider.³⁰²

296. *Id.* (citing *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947)).

297. *Id.*

298. *Id.* at 356.

299. *Id.*

300. *Id.*

301. *Id.*

302. *Id.* at 356-57.

The Mesmans also complained on appeal about an “open and obvious” danger jury instruction that included the following statement: “[A] manufacturer has no duty to warn of *and is not liable for* open and obvious dangers.”³⁰³ The court agreed that the instruction was confusing and should not have been given, noting that the parties probably intended to say that “a manufacturer is not liable for failing to warn of an open and obvious danger rather than that he is not liable for failing to prevent the danger.”³⁰⁴ According to the Seventh Circuit, the latter interpretation “would be squarely contrary to Indiana law.”³⁰⁵ Even though the court determined that the instruction was erroneous, the court did not believe reversal was warranted largely because the plaintiffs failed to explain how the instruction likely influenced the jury in light of their “full opportunity to present multiple theories of liability to the jury.”³⁰⁶

The *Mesman* court appreciated that the plaintiffs had a difficult time at trial countering Konecranes’s efforts to shift all responsibility for the accident to Infra-Metals, Mesman’s employer.³⁰⁷ According to the court,

Konecranes argued that by recommending that Infra-Metals remove the cab, which Infra-Metals refused to do, and by offering training for Infra-Metals’[s] employees on the new decelerator function, which Infra-Metals also declined, Konecranes had done all it could reasonably be expected to do and therefore that Infra-Metals bore all the blame for the accident.³⁰⁸

According to the Seventh Circuit, because the plaintiffs did not argue that Konecranes’s effort to shift all blame for the accident to Infra-Metals was a “red herring,” the misleading “open and obvious” instruction cannot have determined the jury’s verdict.³⁰⁹ As the court wrote:

The defendant’s principal argument was not that the danger was obvious, whether to the accident victim or to the crane’s operator, but that the safety precautions were adequate and that the culpable cause of the accident was Infra-Metals’[s] failure to instruct the operator adequately in the safe operation of the crane. Apparently the jury was persuaded. There are no grounds for setting aside its verdict.³¹⁰

303. *Id.* at 357.

304. *Id.*

305. *Id.*

306. *Id.* at 357-58.

307. *Id.* at 358.

308. *Id.* Indeed, “Konecranes had convinced the jury in the first trial to place two-thirds of the blame for the accident on Infra-Metals; the second jury may have thought three-thirds a better estimate Not that such apportionments always make sense when the issue is liability rather than contribution among joint tortfeasors.” *Id.*

309. *Id.* at 359.

310. *Id.*

In the product liability context, the most resounding effect of the *Mesman* decision probably will be the Seventh Circuit's treatment of the concept of "open and obvious" danger. Although most of the discussion about the concept of "open and obvious" danger in the *Mesman* opinion is presented in the context of the IPLA's "incurred risk" defense, the Seventh Circuit certainly made a point of including a broader discussion earlier in its opinion by referring to the first appeal. Referring to its earlier opinion, the court wrote that "[t]he only really contestable issue [in the first appeal] was whether any precaution was necessary besides the emergency-stop button, since, had the operator pressed it instead of the down button, the accident would not have occurred."³¹¹ The court also explained that "Konecranes argued that by pressing the down button the operator had exposed Mesman to a danger that was 'open and obvious' to the operator, and that a defendant should not be liable for accidents resulting from open and obvious dangers."³¹² At that point, although the Seventh Circuit recognized that Indiana has replaced the "open and obvious" defense with a defense of "incurred risk," the court recognized that the concept is not limited only to the statutory defense:

The fact that a risk is open and obvious remains relevant to liability. It is circumstantial evidence that the user knew of the danger and thus "incurred" the risk. But it also bears on the question whether the risk was great enough to warrant protective measures beyond what the user himself could be expected to take.³¹³

Recall the Seventh Circuit's 2007 decision in *Bourne v. Marty Gilman, Inc.*³¹⁴ We introduced that case in Part I.D.1.³¹⁵ There, the Seventh Circuit affirmed Judge David Hamilton's decision holding that a football goal post that fell and injured a college student during a post-game celebration was not unreasonably dangerous as a matter of law.³¹⁶ The Seventh Circuit agreed that the goal post was not unreasonably dangerous as a matter of law because it was obvious to an objective, reasonable person that a goal post collapsing under the weight of celebrating fans poses a risk of serious injury.³¹⁷

Bourne examined whether the product was defective and unreasonably dangerous as a matter of law, not whether the "incurred risk" defense applied as a matter of law.³¹⁸ Like *Bourne*, *Mesman* also confirms that the concept of "open

311. *Id.* at 355.

312. *Id.*

313. *Id.*

314. 452 F.3d 632 (7th Cir. 2007).

315. *See supra* notes 137-38.

316. *Bourne*, 452 F.3d at 633, 638-39.

317. *Id.* at 634-36.

318. *Id.* at 635-36. The plaintiffs in *Bourne* relied on the Seventh Circuit's first decision in *Mesman v. Crane Pro Services, Inc.*, 409 F.3d 846 (7th Cir. 2005), for the proposition that Indiana law no longer permits a manufacturer to avoid liability in a design defect case simply because a

and obvious” danger remains relevant in Indiana product liability cases even though the 1995 amendments to the IPLA eliminated the so-called “open and obvious” defense. “[O]bviousness,” the *Bourne* court recognized, “remains a relevant inquiry because . . . the question of what is unreasonably dangerous depends upon the reasonable expectations of consumers and expected uses.”³¹⁹ “In some cases, the obviousness of the risk will obviate the need for any further protective measures, or obviousness may prove that an injured user knew about a risk but nonetheless chose to incur it.”³²⁰

The other 2008 case adding to the scholarship in the area of design defects is *Fueger v. CNH America LLC (Fueger II)*.³²¹ In that case, Fueger suffered near fatal injuries while working on a Case Uni-Loader (skid loader) on his father’s farm.³²² Nearly two years after the incident, Fueger filed suit against CNH America (Case) alleging that the skid loader was defective and unreasonably dangerous.³²³ Case moved for summary judgment and Fueger responded, including an affidavit from an expert.³²⁴ Case deposed plaintiff’s expert and at the summary judgment hearing the expert’s affidavit and portions of his deposition transcript were made part of or read into the record.³²⁵ The lower

defect is “open and obvious.” *Bourne*, 452 F.3d at 636. The *Bourne* court was quick to distinguish *Mesman* as a case involving application of the “incurred risk defense,” which the defendant in *Bourne* did not plead nor argue in the case before the court. *Id.* at 636-37. For a discussion of precisely that distinction, see Joseph R. Alberts, James Petersen & Ann L. Thrasher Papa, *Survey of Recent Developments in Indiana Product Liability Law*, 39 IND. L. REV. 1145, 1165-70, 1188-91 (2006).

319. *Bourne*, 452 F.3d at 634-35 (citing IND. CODE §§ 34-20-4-1, 34-6-2-146 (2008); *Mesman*, 409 F.3d at 850-51; *FMC Corp. v. Brown*, 551 N.E.2d 444, 446 (Ind. 1990)).

320. *Id.* (citing *Mesman*, 409 F.3d at 850-51; *FMC Corp.*, 551 N.E.2d at 446).

321. 893 N.E.2d 330 (Ind. Ct. App.), *trans. denied*, 898 N.E.2d 1233 (Ind. 2008).

322. *See Fueger v. Case Corp. (Fueger I)*, 886 N.E.2d 102, 103 (Ind. Ct. App.), *aff’d on reh’g*, 893 N.E.2d 330 (Ind. Ct. App.), *trans. denied*, 898 N.E.2d 1233 (Ind. 2008). There were two *Fueger* decisions issued by the court of appeals during the 2008 survey period. The first, *Fueger I*, primarily analyzed the defendant Case’s motion to strike the affidavit of plaintiff’s expert with little substantive analysis or treatment of the product liability claims alleged in the suit. The second, *Fueger II*, was issued several months later after CNH America filed a petition for rehearing. *Fueger II*, 893 N.E.2d at 331. The second decision more substantively addressed Fueger’s product liability claims against CNH America and whether plaintiff had designated sufficient evidence to overcome CNH America’s motion for summary judgment; however, the second decision contained little information about the facts of the incident. Thus, most of the facts provided to place the decision in context come from the first decision while the analysis of the IPLA comes from the second. Beyond stating that Fueger suffered serious injuries, neither case contains any meaningful discussion of what Fueger claims happened, how he was injured, what he claims was the specific design defect in CNH America’s skid loader, what the feasible alternative design was, and how it may have prevented or lessened the injury.

323. *Fueger I*, 886 N.E.2d at 103.

324. *Id.* at 104.

325. *Id.*

court struck the expert's affidavit and granted Case's motion for summary judgment.³²⁶

The court of appeals reversed, holding that plaintiff's expert was qualified to render opinions about the skid loader and that the trial court erred when it struck the testimony.³²⁷ On rehearing, the court reaffirmed its decision to permit plaintiff's expert's testimony and explained its decision that plaintiff had designated sufficient evidence to establish that the skid loader possessed a defective and unreasonably dangerous design.³²⁸ On rehearing, Case advanced three primary arguments. Case asserted that the skid loader was not defective at the time of its sale and that plaintiff failed to establish that the product had not been substantially altered by the time Fueger was injured.³²⁹ Next it claimed that plaintiff had not established a feasible alternative design.³³⁰ Finally, Case argued that plaintiff failed to show that the skid loader was not state-of-the-art.³³¹ The court rejected Case's arguments, determining that the plaintiff had designated sufficient evidence to create a question of fact on each issue.³³²

Initially, the court of appeals noted that the IPLA governed all product liability actions in Indiana.³³³ The court then moved to Case's first claim—that the skid loader was substantially changed from when it was first sold.³³⁴ Under the IPLA, a manufacturer can only be liable for harm caused by a product if the product reaches the user or consumer without substantial alteration from its condition when first sold.³³⁵ Case premised its argument on the fact that Fueger's father testified that the skid loader had some items in disrepair, such as the fact that the seat bar would not stay up by itself and that the left control lever would stick and not return to center.³³⁶ Relying on *E.Z. Gas, Inc. v. Hydrocarbon Transportation, Inc.*,³³⁷ Case claimed that the items of disrepair created a

326. *Id.*

327. *Id.* at 107. Without analysis, the court also opined that because plaintiff's expert's affidavit and Case's expert's affidavit conflicted, a question of fact remained about plaintiff's defective design claims so the trial court erred in granting Case's summary judgment motion. *See id.*

328. *Fueger v. CNA America LLC (Fueger II)*, 893 N.E.2d 330, 331-33 (Ind. Ct. App.), *trans. denied*, 898 N.E.2d 1233 (Ind. 2008).

329. *Id.* at 331.

330. *Id.*

331. *Id.*

332. *Id.* at 333.

333. *Id.* at 331 (quoting IND. CODE § 34-20-1-1 (2008)).

334. *Id.*

335. *Id.* at 331-32; *see also* IND. CODE § 34-20-2-1 (2008).

336. *Fueger II*, 893 N.E.2d at 331-32.

337. 471 N.E.2d 316 (Ind. Ct. App. 1984).

substantial change³³⁸ in the design of the unit and caused the accident.³³⁹ Plaintiff's expert claimed that the design of the skid loader had not been modified or altered since it was first sold.³⁴⁰ Instead, he claimed, the items of disrepair identified by Fueger's father were reasonably expected from normal wear and tear.³⁴¹ The expert further claimed that the placement of the on/off switch and the condition of the seat bar and lift control lever were all safety design defects.³⁴² Because of the claim that the wear and tear was not a substantial change, but rather a design defect, the court of appeals explained that the expert's testimony created a question of fact as to whether the skid loader had been substantially changed since it was first sold, which was inappropriate for summary disposition.³⁴³

Case next claimed that Fueger had failed to establish a question of fact as to a feasible alternative design.³⁴⁴ On this point, the court of appeals pointed to plaintiff's expert's testimony that he had observed another skid loader of roughly the same age equipped with foot controls.³⁴⁵ The Case skid loader was equipped with hand controls.³⁴⁶ The expert added that "he had also studied other [similar] vintage machines and found various features of [the others that he believed were] considerably safer than the Case skid loader."³⁴⁷ Moreover, the other machines were manufactured with different types of interlock systems for access to the controls.³⁴⁸ Again the court concluded that Fueger had designated sufficient evidence to create a question of fact as to whether a cost-effective design existed that may have prevented his injuries.³⁴⁹

Fueger is noteworthy for its treatment of both the alteration and feasible alternative design issues vis-à-vis design defect. The skid loader was nearly ten years old when the incident occurred.³⁵⁰ The IPLA's statute of limitations is ten years.³⁵¹ One must assume the owner of the product, Fueger's father, knew about the skid loader's "items of disrepair" and, as they existed when the incident

338. *E.Z. Gas* provides that, "a substantial change is defined as any change which increases the likelihood of malfunction, which is the proximate cause of the harm complained of, and which is independent of the expected and intended use of the product." *Id.* at 319.

339. *Fueger II*, 893 N.E.2d at 332.

340. *Id.*

341. *Id.*

342. *Id.*

343. *Id.*

344. *Id.*

345. *Id.*

346. *Id.*

347. *Id.*

348. *Id.*

349. *Id.*

350. *Fueger v. Case Corp. (Fueger I)*, 886 N.E.2d 102, 103 (Ind. Ct. App.), *aff'd on reh'g*, 893 N.E.2d 330 (Ind. Ct. App.), *trans. denied*, 898 N.E.2d 1233 (Ind. 2008). The skid loader was manufactured by Case on March 3, 1994, and Fueger was injured on July 7, 2003. *Id.*

351. IND. CODE § 34-20-3-1 (2008).

occurred, had not corrected them. It is understandable that mechanical devices can fail and perhaps even foreseeable that they may fail due to lack of maintenance, but it may not be appropriate to hold a manufacturer liable for an injury when the owner of the product has failed to maintain the product or where a user, with knowledge of the disrepair, uses the equipment and apparently the “items of disrepair” cause the injury.

More explanation and analysis from the court on these issues would have provided more guidance and made the decision more helpful to practitioners. Merely stating that plaintiff’s expert opines that more than nine years into the life of a product the product is not working properly, i.e. its need for repair and maintenance, is normal wear and tear and evidence of a design defect³⁵² leaves a reader less than satisfied. No one would disagree that some level of “disrepair” may be expected from normal wear and tear, but without more explanation, positing that it is evidence of a design defect leaves a reader desiring a more thorough analysis.

Without information concerning the plaintiff’s mechanism of injury and how the design of the product caused or contributed to the cause of the plaintiff’s injury, the court of appeals analysis of alternative design is similarly less than instructive. The court penned that plaintiff’s expert had examined another manufacturer’s skid loader of roughly the same age and that his study of others led him to conclude that many other features on other machines were considerably safer than Case’s skid loader.³⁵³ Nonetheless, there is no substantive discussion of the quality of the safety mechanisms. As with the court’s treatment of the skid loader’s disrepair, the court’s analysis of the plaintiff’s requirement to establish a feasible alternative design similarly leaves anyone looking to the decision for guidance wanting more.

3. Manufacturing Defect Theory.—A federal decision issued by Judge Roger Cosbey in 2008, *Campbell v. Supervalu, Inc.*,³⁵⁴ is the latest case to substantively address issues arising in the context of manufacturing defects.³⁵⁵ In *Campbell*, a five-year old boy became seriously ill with *E. coli* poisoning after eating ground beef purchased at a Cub Foods grocery store in Fort Wayne.³⁵⁶ Nearly thirteen years later, the boy and his parents sued Supervalu, Inc., an entity that operates a chain of food stores.³⁵⁷ The plaintiffs contended that Supervalu introduced *E. coli* bacteria into the ground beef during the grinding and packaging process.³⁵⁸

352. *Fueger II*, 893 N.E.2d at 332.

353. *Id.*

354. 565 F. Supp. 2d 969 (N.D. Ind. 2008).

355. *Gaskin v. Sharp Electronics Corp.*, No. 2:05-CV-303, 2007 U.S. Dist. LEXIS 72347 (N.D. Ind. Sept. 26, 2007) is another recent opinion addressing substantive issues raised in the context of an alleged manufacturing defect. For a detailed analysis of *Gaskin*, see Alberts, Petersen & Thornburg, *supra* note 98, at 1176-80.

356. *Campbell*, 565 F. Supp. 2d at 971-72.

357. *Id.* at 973 (noting that the boy became ill in September 1993 and brought suit in September 2006).

358. *Id.* at 972-73.

The plaintiffs filed suit in September 2006, alleging claims of negligence, product liability, and breach of an implied warranty of fitness.³⁵⁹ The case was thereafter removed to federal court.³⁶⁰

Judge Cosbey granted summary judgment to Supervalu, determining that the IPLA's statute of repose barred all claims and that, in any event, the claims also failed because there was no evidence that Supervalu owned the grocery store at the time the incident occurred. Additionally, there was no evidence that the ground beef was within its control during the relevant time or that the ground beef, in fact, contained the bacteria that caused the illness.³⁶¹ The statute of repose issue is addressed below.³⁶² This Survey does not focus on the issues involving Supervalu's alleged responsibility for the Cub Foods store; such issues largely involve interpretation and timing of relevant contractual arrangements, which are outside the scope of this Survey.³⁶³ We will, however, devote some discussion to the substantive proof issues raised as they relate to the plaintiffs' manufacturing defect claim.

The evidence presented revealed that the ground beef at issue was sold in the store's meat department, in typical packaging, and that there was nothing unusual about its appearance or odor at the time of purchase.³⁶⁴ After returning home, the boy's mother placed the package in the refrigerator and, later that evening, browned it and incorporated it into a Hamburger Helper meal.³⁶⁵ Several other people ate the ground beef in addition to the child.³⁶⁶ There is no evidence that there was anything unusual about the food's taste, color, or appearance.³⁶⁷ "The leftovers were stored in a closed plastic container in the refrigerator."³⁶⁸ The next day, the child became seriously ill and suffered from acute and chronic renal failure, insulin-dependent diabetes mellitus, and congestive heart failure.³⁶⁹ Another child who ate the ground beef became ill a day or two later, but not as

359. *Id.* at 973.

360. *Id.*

361. *Id.* at 974-81.

362. *See infra* Part II.B.

363. Although the evidence examined is largely contractual in nature, the court examined such evidence in a tort context and with the purpose of determining whether Supervalu owed a "duty" to the plaintiffs. *See Campbell*, 565 F. Supp. 2d at 978-79. In doing so, the court concluded that Supervalu owed no "duty" to the plaintiffs because there was insufficient evidence that Supervalu owned or operated the Cub Foods store at issue at the time the ground beef was purchased, and/or that Supervalu had control of the beef or the packaging or grinding equipment at the time the beef was sold to the plaintiffs. *Id.* at 978-81.

364. *Id.* at 972.

365. *Id.*

366. *Id.*

367. *Id.*

368. *Id.*

369. *Id.*

severely.³⁷⁰ None of the adults who ate the hamburger became sick.³⁷¹ The Indiana State Department of Health (ISDOH) subsequently tested some of the frozen leftovers of the Hamburger Helper meal.³⁷² The laboratory analysis was inconclusive and could not determine whether there was or was not *E. coli* in the ground beef.³⁷³

In virtually every food contamination case, plaintiffs assert manufacturing defect theories in their attempt to prove that the food in question was in a “defective condition.” Indeed, a manufacturing defect theory is usually the only one that fits because most food contamination cases, by necessity, do not involve warnings or improper design. Rather, the factual allegations are that the allegedly tainted food product did not conform to its intended specifications, almost always as a result of spoliation, contamination, or some other problem with its processing, shipping, or storage.

It is peculiar, therefore, that Judge Cosbey appears to have theorized that the plaintiffs intended to pursue only a “simple negligence” claim and had abandoned their “strict liability” claim.³⁷⁴ That description makes little sense because the only operative product liability theory involved in the case was an alleged manufacturing defect. Indeed, because IPLA sections 2-1 and 2-2 make it clear that strict liability attaches only to claims alleging manufacturing defect theories,³⁷⁵ there does not appear to have been a “simple negligence” claim available for plaintiffs to pursue to the extent plaintiffs were pursuing claims under the current IPLA.³⁷⁶

Regardless of whether plaintiffs intended to pursue a “strict liability” claim or not, that is, in point of fact, what the IPLA requires them to have pursued because a manufacturing defect is really the only theory that applies under the circumstances.³⁷⁷ Accordingly, we suggest that practitioners should view the court’s disposition of the case in that context—as if plaintiffs were utilizing a manufacturing defect theory to prove the beef in question was contaminated with bacteria and, therefore, in a “defective condition.”

Among the bases for the court’s disposition was a close analysis of the sufficiency of plaintiffs’ causation evidence. Plaintiffs argued that there was a genuine issue of material fact concerning whether the ground beef was contaminated with *E. coli* and whether it caused the child’s injuries.³⁷⁸ The plaintiffs pointed to the treating physician’s diagnosis of “Hemolytic Uremic

370. *Id.*

371. *Id.*

372. *Id.*

373. *Id.* at 972-73.

374. *Id.* at 974 n.6.

375. *See* IND. CODE §§ 34-20-2-1, -2 (2008).

376. Judge Cosbey nevertheless provided an explanation “in order to complete the record” about why each of the claims (IPLA-based negligence, IPLA-based strict liability, and breach of warranty) were time-barred. *Campbell*, 565 F. Supp. 2d at 974 n.6.

377. *See* IND. CODE §§ 34-20-2-1, -2 (2008).

378. *Campbell*, 565 F. Supp. 2d at 973.

Syndrome and her conclusion that the child's stool sample tested positive for *E. coli*, emphasizing that [the physician opined that the child's] symptoms [were] typical of someone who ingested *E. coli* within the preceding one to eight days."³⁷⁹ The plaintiffs also relied on the evidence that both the child and his cousin "shared the same meal and subsequently became ill over the next two days."³⁸⁰ Finally, they argued that although the test results on the ground beef were inconclusive, they could not be read to mean that the beef was free of any *E. coli* bacteria.³⁸¹

The court determined that there was simply insufficient evidence as a matter of law to justify a finding that there was a causal connection between the child's illness and the ground beef:

"While [causation] is generally a question of fact, it becomes a question of law where only a single conclusion can be drawn from the facts." Consequently, evidence that merely establishes a possibility of cause, or which lacks reasonable certainty or probability, is not enough by itself to support a verdict; in short, liability may not be predicated purely upon speculation At the outset, it is important to note that there is nothing in the record demonstrating that *E. coli* was even present in the ground beef sold to the [plaintiffs], let alone that Supervalu did anything to introduce it into the product At best, the [plaintiffs] have established that the ground beef was one possible source, among many others, for the introduction of the *E. coli* bacteria into [the child's] body. Indeed, even [the treating physician] does not link the cause of [the child's] illness to his ingestion of the ground beef any more than she links it to anything else he presumably consumed in the *eight* days preceding the onset of his illness. Thus . . . it adds nothing to the causation analysis because in effect it is a tautology: the ground beef may or may not have introduced the *E. coli* into [the child's] body; and in fact, practically anything he ingested over the previous eight days could have been the culprit. This purported opinion testimony does not support the [plaintiffs'] claim as it does nothing to resolve a fact in issue. Similarly, the [plaintiffs'] testimony that both [the child] and his cousin became sick after eating the meal does little to show that it was more likely than not that the beef was to blame. After all, four others also consumed the same meal, in fact, more of it, and experienced no such symptoms. Furthermore . . . that the lab tests were inconclusive does nothing to tip the balance in the [plaintiffs'] favor and merely underscores the speculative nature of the evidence and the ultimate conclusion, that the true source of the *E. coli* remains unknown.³⁸²

379. *Id.* at 980.

380. *Id.*

381. *Id.*

382. *Id.* at 980-81 (quoting *Hamilton v. Ashton*, 846 N.E.2d 309, 316 (Ind. Ct. App. 2006)) (other citations omitted).

As a result, Judge Cosbey concluded that “to ask a jury to decide whether the beef was the cause of [the child’s] illness would invite nothing but speculation” and that “without a causal link between [the child’s] illness and the ground beef, the [plaintiffs] have no viable claim under any theory.”³⁸³

E. Regardless of the Substantive Legal Theory

Indiana Code section 34-20-1-1 provides that the IPLA “governs all actions that are: (1) brought by a user or consumer; (2) against a manufacturer or seller; and (3) for physical harm caused by a product; *regardless of the substantive legal theory or theories upon which the action is brought*.”³⁸⁴ At the same time, however, Indiana Code section 34-20-1-2 provides that the “[IPLA] shall not be construed to limit any other action from being brought against a seller of a product.”³⁸⁵

In cases where a person who is a user or consumer under the IPLA sues an entity that is a manufacturer or seller under the IPLA for what is indisputably a physical harm caused by a product, the IPLA seems to require courts to merge all claims or theories of recovery into the IPLA and that the IPLA should provide the sole basis for the operative theories and claims that may be pursued. Recently-decided cases such as *Cincinnati Insurance Cos. v. Hamilton Beach/Proctor-Silex, Inc.*,³⁸⁶ *Ryan v. Philip Morris USA, Inc.*,³⁸⁷ and *Fellner v. Philadelphia Toboggan Coasters, Inc.*,³⁸⁸ all reinforce the IPLA merger premise when

383. *Id.* at 981.

384. IND. CODE § 34-20-1-1 (2008) (emphasis added).

385. *Id.* § 34-20-1-2.

386. No. 4:05 CV 49, 2006 WL 299064 (N.D. Ind. Feb. 7, 2006). There, a fire that allegedly started in a toaster manufactured by the defendant, Hamilton Beach/Proctor Silex (Hamilton Beach), destroyed a couple’s home and personal property. *Id.* at *1. Cincinnati Insurance insured the couple’s home and brought a subrogation action against Hamilton Beach, asserting claims for negligence, breach of warranty, strict liability, violation of the Magnuson-Moss Warranty Act, and negligent failure to recall. *Id.* Hamilton Beach moved to dismiss the negligence, warranty, Magnuson-Moss, and negligent failure to recall claims. *Id.* The court agreed that the IPLA subsumes and incorporates all negligence and tort-based warranty claims. *Id.* at *2.

387. No. 1:05 CV 162, 2006 WL 449207 (N.D. Ind. Feb. 22, 2006). In *Ryan*, the widow of a man who allegedly died as a result of smoking asserted causes of action against several cigarette manufacturers for product liability, negligence, and fraud. *Id.* at *1. The defendants argued that the IPLA provides the sole and exclusive remedy for personal injuries allegedly caused by a product. *Id.* at *2. The court agreed, holding that the IPLA unequivocally precludes a plaintiff’s common law negligence and fraud claims. *Id.*

388. No. 3:05-cv-218-SEB-WGH, 2006 WL 2224068 (S.D. Ind. Aug. 2, 2006). The *Fellner* case involved a person who was killed when she was ejected from a wooden roller coaster at Holiday World amusement park. *Id.* at *1. One of the defendants that the personal representative of Fellner’s estate sued was Koch Development Corp. (Koch), the entity that owned and operated both Holiday World and the roller coaster involved. *Id.* Plaintiff sought to hold Koch liable for negligence, strict liability, and breach of implied warranties. *Id.* Like the decisions in *Cincinnati*

plaintiffs offer tort-based theories of recovery arising out of physical harm caused by a product and when the defendant is a manufacturer or seller of that allegedly-offending product.

When the plaintiff's harm is economic in nature, he has, by definition, not suffered a "physical harm" as the IPLA defines that term.³⁸⁹ Consequently, it makes sense that contract-based warranty theories of recovery are among the claims and theories that are intended to fall within the category of "any other action" that Indiana Code section 34-20-1-2 does not limit, and recent decisions have routinely agreed.³⁹⁰ It also makes sense that non-IPLA based statutory or "common law" liability imposed against entities that are not manufacturers or sellers and, therefore, not otherwise covered by the IPLA, would also fall into the

Insurance and *Ryan*, the *Fellner* decision held that the tort-based implied warranty claim merged into plaintiff's IPLA-based product liability claims, resulting in dismissal of the breach of implied warranty claim because it was not a stand-alone theory of recovery. *Id.* at *4. As noted above, however, it is important to point out that the *Fellner* decision employs the term "strict liability" as if it is synonymous with all IPLA-based product liability claims. *Id.* It is not. The IPLA imposes a negligence standard in all product liability claims relying upon a design or warning theory to prove defectiveness, while retaining strict liability (liability despite the exercise of "all reasonable care") only for those claims relying upon a manufacturing defect theory. IND. CODE § 34-20-2-2 (2008); *see also* *Mesman v. Crane Pro Servs.*, 409 F.3d 846, 849 (7th Cir. 2005) ("Under Indiana's products liability law, a design defect can be made the basis of a tort suit only if the defect was a result of negligence in the design . . ."); *First Nat'l Bank & Trust Corp. v. Am. Eurocopter Corp. (Inlow II)*, 378 F.3d 682, 690 n.4 (7th Cir. 2004) ("Both Indiana's 1995 statute . . . and its 1998 statute abandoned strict liability in design defect and failure to warn cases. Hence, unlike manufacturing defects, for which manufacturers are still held strictly liable, claims of design defect and failure to warn must be proven using negligence principles."); *Conley v. Lift-All Co.*, No. 1:03-cv-01200-DFH-TAB, 2005 U.S. Dist. LEXIS 15468, at *12-13 (S.D. Ind. July 25, 2005) ("The IPLA effectively supplants [the plaintiff's] common law claims because all of his claims are brought by a user or consumer against a manufacturer for physical harm caused by a product. Plaintiff's common law claims will therefore be treated as merged into the IPLA claims."); *Bourne v. Marty Gilman, Inc.*, No. 1:03-cv-01375-DFH-VSS, 2005 U.S. Dist. LEXIS 15467, at *9 n.2 (S.D. Ind. July 20, 2005) ("[P]laintiffs may not pursue a separate common law negligence claim [for design defect]. Their negligence claim is not dismissed but is more properly merged with the statutory claim under the IPLA, which includes elements of negligence."), *aff'd*, 452 F.3d 632 (7th Cir. 2006); *Miller v. Honeywell Int'l, Inc.*, No. IP98-1742C-M/S, 2002 U.S. Dist. LEXIS 20478, at *38 (S.D. Ind. Oct. 15, 2002), *aff'd*, 107 Fed. App'x 693 (7th Cir. 2004); *Burt v. Makita USA, Inc.*, 212 F. Supp. 2d 893, 899-900 (N.D. Ind. 2002); *Birch v. Midwest Garage Door Sys.*, 790 N.E.2d 504, 518 (Ind. Ct. App. 2003). Thus, when interpreting the *Fellner* decision, practitioners should recognize that the court merged the tort-based breach of implied warranty claim into the IPLA claim even though only plaintiff's manufacturing defect theory involves "strict liability."

389. *See* IND. CODE § 34-6-2-105(b) (2008).

390. *E.g.*, *Fellner*, 2006 WL 2224068, at *4; *see also* *N.H. Ins. Co. v. Farmer Boy AG, Inc.*, IP 98-0031-C-T/G, 2000 U.S. Dist. LEXIS 19502, at *10-11 (Dec. 19, 2000) (holding that a claim alleging breach of implied warranty in tort has been superceded by IPLA-based liability, and thus, plaintiff could proceed on a warranty claim so long as it was limited to a breach of contract theory).

category of “any other action” that Indiana Code section 34-20-1-2 does not limit.

A few recent Indiana cases, however, have had seemingly little trouble allowing non-IPLA-based claims, whether under the guise of statutory or other “common law” claims, to be maintained against product manufacturers and sellers for physical harm a product causes. The 2008 survey period provides two examples. In *Kovach v. AlphaPharma, Inc.*,³⁹¹ addressed in detail above in Part I.D.1., the parents of a child who died from an overdose of codeine following surgery sued the manufacturers and sellers of the cup used to dispense the codeine. The cup was made of flexible translucent plastic and denoted various volume measurement graduation markings, including milliliters (ml), drams, ounces, teaspoons, tablespoons, and cubic centimeters.³⁹² The “measurement markers [were] located on the interior surface of the [c]up and [had] a similar translucency as the [c]up.”³⁹³

The child’s parents asserted against the cup manufacturers and sellers a Uniform Commercial Code (UCC)-based claim for breach of the implied warranty of merchantability, a UCC-based claim for breach of implied warranty of fitness for a particular purpose, an IPLA-based “strict liability in tort” claim, and an IPLA-based “negligence” claim.³⁹⁴ The trial court granted summary judgment to the cup manufacturers and sellers as to each of the foregoing four claims, presumably because it found insufficient evidence to sustain a verdict that the cup was defective and/or unreasonably dangerous.³⁹⁵

In a 2-1 decision, the court of appeals reversed in part and affirmed in part, ultimately allowing what it called both “strict liability” and “negligence” claims to be offered to the jury in addition to a UCC-based implied warranty of merchantability claim.³⁹⁶ Though the authors recognize that the Indiana Supreme Court granted transfer in *Kovach* in February 2009, we nevertheless analyze it in this Survey because the issue it raises may be important to Indiana judges and practitioners as they await the Indiana Supreme Court’s decision.

In doing so, the majority’s opinion states that

[a]ctions brought under the [IPLA] and the UCC “represent two different causes of action . . . [t]he [IPLA] governs product liability actions in which the theory of liability is negligence or strict liability in tort, while the UCC governs contract cases which are based on a breach of

391. 890 N.E.2d 55 (Ind. Ct. App. 2008), *trans. granted*, (Ind. Feb. 27, 2009).

392. *Id.* at 61.

393. *Id.*

394. *Id.*

395. *Id.* We presume from the surrounding context that the trial court so found. Because the court of appeals described the trial court as having “summarily” granted summary judgment without any findings of fact or conclusions of law, the opinion is devoid of specific reasoning for the trial court’s decision to grant summary judgment. *See id.* at 65. We also note here that the cup manufacturers and sellers cross-appealed, arguing that the trial court erred by denying a motion to exclude the opinion testimony of plaintiffs’ expert witness. *Id.* at 61.

396. *Id.* at 72.

warranty.” . . . The UCC and the Product Liability Act provide alternative remedies. Also, the adoption of the Product Liability Act did not vitiate the provisions of the UCC.³⁹⁷

The case to which the majority cites for that proposition, *Hitachi Construction Machinery Co. v. AMAX Coal Co.*,³⁹⁸ relies on a case decided in 1991, four years before the 1995 amendments to the IPLA took effect.³⁹⁹

*Deaton v. Robison*⁴⁰⁰ is the other published decision handed down during the 2008 survey period that seems to countenance both IPLA-based and non-IPLA-based liability against product manufacturers and sellers for the same physical harm.⁴⁰¹ Although making it clear initially that the case “falls within the provisions of the [IPLA],” the *Deaton* opinion also notes that Indiana has “adopted” Section 388 of the Restatement (Second) of Torts, which seeks to impose common law liability upon possessors of defective and unreasonably dangerous chattel.⁴⁰² Recall that the dangerous chattel involved in *Deaton* was a black powder rifle.⁴⁰³ It would, therefore, appear as though the court of appeals panel in *Deaton* believed that imposition of common law Restatement-based liability against the rifle’s manufacturer in addition to IPLA-based liability would have been acceptable had the case been allowed to proceed to the jury.⁴⁰⁴

The judges deciding *Kovach* and *Deaton* seem to have no qualms allowing

397. *Id.* at 67-68 (quoting *Hitachi Constr. Mach. Co., v. AMAX Coal Co.*, 737 N.E.2d 460, 465 (Ind. Ct. App. 2000)).

398. 737 N.E.2d 460 (Ind. Ct. App. 2000).

399. The case that the *Kovach* and *Hitachi* majority rely upon for that point is *B&B Paint Corp. v. Shrock Manufacturing, Inc.*, 568 N.E.2d 1017, 1020 (Ind. Ct. App. 1991). See *Kovach*, 890 N.E.2d at 67.

400. 878 N.E.2d 499 (Ind. Ct. App. 2007), *trans. denied*, 891 N.E.2d 49 (Ind. 2008).

401. *Deaton* is also discussed previously. See *supra* Part I.D.1.

402. *Deaton*, 878 N.E.2d at 501.

403. *Id.*

404. *Id.* Recall the *Campbell* case addressed *supra* Part I.D.3. in which a child suffered serious injuries after eating ground beef that allegedly was contaminated with *E. coli* bacteria. *Campbell v. Supervalu, Inc.*, 565 F. Supp. 2d 969, 971-73 (N.D. Ind. 2008). There, in the context of applying the IPLA’s statute of repose to time-bar plaintiffs’ claims, the court unmistakably concluded that the IPLA governs all of the claims alleging physical harm arising out of injuries suffered by a child allegedly as a result of eating ground beef that was contaminated with *E. coli*. *Id.* at 975-77. That decision, on the surface, seems to be a recognition that all claims, including all non-IPLA-based implied warranty claims were merged into the IPLA and were all time barred by its ten-year statute of repose. Deeper analysis reveals, however, that Judge Cosbey nevertheless provided an explanation in a footnote “in order to complete the record” about why each of the claims (IPLA-based negligence, IPLA-based strict liability, and breach of warranty) were time-barred. *Id.* at 974-75 n.6. In doing so, it is difficult to determine whether he believes that implied warranty claims *may* exist in addition to IPLA-based claims arising out of the same physical harm or whether his efforts were merely offered in the abstract to demonstrate that the a separate statutory limitations period barred the implied warranty claims even if they *could* be separately pursued. *Id.*

non-IPLA-based claims and theories to proceed against manufacturers and sellers of products for the same physical injuries that the IPLA is intended to govern. We do not know whether that is deliberate or merely because they were unaware of the issues identified here. Regardless, these cases require us to ponder the significance of the “regardless of the operative theory of liability” language in Indiana Code section 34-20-1-1.⁴⁰⁵ It would seem as though the legislature used that limiting language for a reason, and it seems fairly clear that the intention was to eliminate all claims and theories of liability against manufacturers and sellers of products that cause physical harm that are not specifically enumerated in the IPLA itself.

As noted above, the type of legal theories and claims to which Indiana Code section 34-20-1-2 appears to except from the IPLA’s reach fall into one of three categories: (1) those that do not involve physical harm (i.e., economic losses that are otherwise covered by contract or warranty law); (2) those that do not involve a “product;” and (3) those that involve entities that are not “manufacturers” or “sellers” under the IPLA.

A comparison of three published cases all decided during the 2008 survey period illustrates some important distinctions in this context and may provide practitioners with useful guidance when trying to determine the intended scope of the IPLA. First, recall that in *Mesman*,⁴⁰⁶ the Seventh Circuit chastised the judge presiding over the trial for permitting Konecranes to argue that it could not be responsible under the IPLA for the location of the crane’s cab because it had not manufactured the crane, but rather merely repaired it.⁴⁰⁷ As the Seventh Circuit pointed out, the IPLA does not consider entities who merely performed repairs a “manufacturer” for purposes of a design defect claim unless the facts demonstrate that the entity performing the purported “repair” actually did more than just make repairs.⁴⁰⁸

As it turned out, the Seventh Circuit was convinced that Konecranes did much more than merely repair the crane because it “alter[ed the crane’s] design to enable it to be operated from ground level rather than just from the overhead cab.”⁴⁰⁹ Konecranes should not, therefore, have been permitted to shield itself from IPLA liability.⁴¹⁰ The Seventh Circuit, however, concluded that the presiding judge’s error in permitting Konecranes to argue that it should not be liable under the IPLA was ultimately “inconsequential, because the plaintiffs were permitted to claim common law negligence.”⁴¹¹ Although the opinion does not elaborate any further, that statement makes sense if the “common law negligence” claim to which the court refers is a separate negligence count against

405. IND. CODE § 34-20-1-1 (2008).

406. Addressed *supra* Part I.D.2.

407. *Mesman v. Crane Pro Servs.*, 512 F.3d 352, 356 (Ind. 2008).

408. *Id.* (citing *Lenhardt Tool & Die Co. v. Lumpe*, 703 N.E.2d 1079, 1085 (Ind. Ct. App. 1998); *Richardson v. Gallo Equip. Co.*, 990 F.2d 330 (7th Cir. 1993)).

409. *Id.*

410. *Id.*

411. *Id.*

Konecranes for performing repairs in a negligent fashion and that those negligent repairs caused the physical injuries alleged. In that connection, the Seventh Circuit's disposition seems perfectly appropriate. Konecranes was, in effect, allowed to try to extricate itself from IPLA-based liability by arguing it merely made repairs. If the jury agreed that Konecranes merely repaired the crane, then it could still be liable if the jury found that it made those repairs negligently under Indiana common law.

The situation in *Mesman* seems fundamentally different from the situation in *Kovach*.⁴¹² In *Kovach*, the court permitted both IPLA-based and non-IPLA-based common law theories to proceed at the same time against entities that were clearly covered and otherwise governed by the IPLA by virtue of their status as manufacturers and sellers.⁴¹³ In such situations, the IPLA appears to make clear that the IPLA (and only the IPLA) governs and specifically provides which claims and theories can be asserted against product manufacturers or sellers for the physical harm the product caused.⁴¹⁴ That would seem to be precisely why the IPLA includes the "regardless of theory of liability" language.⁴¹⁵ Many would argue that *Kovach* and cases like it go too far when they allow statutory or common law claims to proceed against entities that are undeniably product manufacturers and sellers arising out of the same physical harm that the IPLA is intended to govern.

In *Mesman*, by contrast, the Seventh Circuit's commentary about an additional "common law negligence" claim⁴¹⁶ does not appear to present the same peculiarity as *Kovach*, so long as the "common law negligence" to which the Seventh Circuit refers is negligence against Konecranes arising out of poor quality repairs to the crane. As it appears the Seventh Circuit correctly recognized, the erroneous instruction would result in one of two eventualities: (1) the jury would reject Konecranes's "we only repaired" argument and it would, therefore, face IPLA-based liability as a manufacturer of the crane; or, in the alternative, (2) the jury would accept the "we only repaired" argument and Konecranes would face the prospect of common law liability. The important distinction between *Mesman* and *Kovach* is that the defendant in *Mesman* could not face the prospect of *both* IPLA-based and non-IPLA-based liability arising out of the same physical harm. That is precisely what the *Kovach* defendants face and what other manufacturer and seller defendants in product liability cases may continue to face as a result of decisions such as *Kovach*.

As noted a number times above, the Indiana Supreme Court granted transfer in *Kovach* in February 2009. Perhaps this will be among the issues that the court clarifies in its decisions.

412. *Kovach* is discussed in detail *supra* Part I.D.1.

413. See *Kovach v. Alpharma, Inc.*, 890 N.E.2d 55 (Ind. Ct. App. 2008), *trans. granted*, (Ind. Feb. 27, 2009).

414. See IND. CODE § 34-20-1-1 (2008).

415. *Id.*

416. *Mesman*, 512 F.3d at 356.

The second case, *Smith & Wesson Corp. v. City of Gary*,⁴¹⁷ is also interesting. There, the City of Gary sued the manufacturers and sellers of handguns under a variety of different legal theories, including public nuisance, negligent distribution, and negligent design.⁴¹⁸ After the trial court initially dismissed the claims, the case worked its way through both the Indiana Court of Appeals and the Indiana Supreme Court, resulting in two different published opinions.⁴¹⁹ The court of appeals's opinion in October 2007 marked the third published opinion in the trilogy. The 2007 decision by the court of appeals affirmed a ruling allowing the manufacturers and sellers to face potential liability pursuant to Indiana's public nuisance statute.⁴²⁰

The precise nature of the physical harm suffered is the seminal question in terms of available claims in a case such as *Smith & Wesson*. If actual deaths and injuries as a result of the guns sold by the manufacturers and sellers constituted the "physical harm" underlying the nuisance claim, then the IPLA would govern the claims against them and all theories would merge.⁴²¹ There would be no public nuisance theory available, nor would there be separate claims available for negligent "distribution" or "marketing." The only post-merger theories that would be available are found in the IPLA itself, namely failure to warn and defective design.⁴²² A close review of the case, however, reveals that the "harm" underlying the City of Gary's public nuisance claim was not actual deaths or injuries suffered as a result of gun violence, but rather the increased availability or supply of handguns "to criminals, juveniles, and others who may not lawfully purchase them."⁴²³ In summarizing the nuisance allegations, the Indiana Supreme Court wrote as follows:

The City alleges that the dealer-defendants have participated in straw purchases and other unlawful retail transactions, and that manufacturers and distributors have intentionally ignored these unlawful transactions.

417. 875 N.E.2d 422 (Ind. Ct. App. 2007), *trans. denied*, (Ind. Jan. 12, 2009).

418. *Id.* at 425 (quoting *City of Gary ex rel. King v. Smith & Wesson Corp.*, 801 N.E.2d 1222, 1227-29 (Ind. 2003)). The Indiana Supreme Court had remanded the case; thus, the court of appeals relied on the supreme court's treatment of the facts. *Id.* at 424-26.

419. *See City of Gary v. Smith & Wesson Corp.*, 776 N.E.2d 368 (Ind. Ct. App. 2002), *rev'd*, 801 N.E.2d 1222 (Ind. 2003); *City of Gary ex rel. King v. Smith & Wesson Corp.*, 801 N.E.2d 1222 (Ind. 2003).

420. *Smith & Wesson*, 875 N.E.2d at 424. There is no question that the defendants remaining in the case were gun manufacturers and/or sellers as the IPLA contemplates the terms. *Id.* at 424 n.1, 425. The dispositive issue on appeal had nothing to do with the IPLA. The issue, as stated by the court of appeals, was "[w]hether the Protection of Lawful Commerce in Arms Act ('PLCAA'), 15 U.S.C. §§ 7901-7903, bars the City's nuisance claims." *Id.* at 424. Because the court concluded that the PLCAA does not bar the City of Gary's claims, the court did not address the constitutional issues the parties also raised. *Id.*

421. *See* IND. CODE § 34-20-1-1 (2008); *see also supra* notes 386-88 and accompanying text.

422. *See* IND. CODE §§ 34-20-4-1 (defective product), 34-20-4-2 (failure to warn) (2008).

423. *Id.* at 426 (citing *City of Gary ex rel. King*, 801 N.E.2d at 1231).

The result is a large number of handguns in the hands of persons who present a substantial danger to public safety in the City of Gary Taken as true, these allegations are sufficient to allege an unreasonable chain of distribution of handguns sufficient to give rise to a public nuisance generated by all defendants.⁴²⁴

Accordingly, the *Smith & Wesson* court's decision to allow the City of Gary to pursue its alleged public nuisance theories against the gun manufacturers and sellers does not seem inconsistent with Indiana law, even though those claims exist outside the purview of the IPLA.

The third case, *Dutchmen Manufacturing, Inc. v. Reynolds*,⁴²⁵ allowed non-IPLA-based liability to be imposed, but that was in a case in which neither a "product" nor a "manufacturer" or "seller" was involved. There, "Dutchmen was a tenant in a recreational vehicle (RV) manufacturing facility in Goshen."⁴²⁶ "While Dutchmen was leasing the facility, . . . it constructed some scaffolding and installed several work platforms for use in the manufacturing process The scaffolds were mechanical platforms that hung from the building's ceiling and could be raised and lowered."⁴²⁷ When Dutchmen moved out of the manufacturing facility, it left behind the platforms for the new tenant, Keystone RV.⁴²⁸ The plaintiff, a Keystone employee, was injured when one of the scaffolds broke.⁴²⁹

The plaintiff's principal legal theory against Dutchman was based upon Section 388 of the Restatement (Second) of Torts.⁴³⁰ In refusing to reverse a jury verdict for the plaintiff, the court of appeals in *Dutchmen* concluded, among other things, that there was sufficient evidence of poor workmanship to allow the plaintiff to present a Section 388 claim to the jury.⁴³¹ The trial court made clear that Dutchmen could not be liable under any product liability theory because "Dutchmen [was] not engaged in the business of constructing and/or selling the scaffolding . . . , for resale, use or consumption."⁴³² The trial court also made clear that, "[t]he incident in this case was an isolated dealing and Dutchmen is not a seller or manufacturer of a product which would invoke the [IPLA]."⁴³³

Mesman, *Smith & Wesson*, and *Dutchmen* all allow non-IPLA-based claims to go forward, but those cases are all different from *Kovach* and *Deaton* in important ways. In *Mesman*, the non-IPLA-based "common law" theory was allowed to go the jury only as a "back up" in the event that the jury found

424. *Id.* (quoting *City of Gary ex rel. King*, 801 N.E.2d at 1241) (other citations omitted).

425. 891 N.E.2d 1074 (Ind. Ct. App.), *trans. denied*, 898 N.E.2d 1233 (Ind. 2008).

426. *Id.* at 1078.

427. *Id.*

428. *Id.* at 1079.

429. *Id.*

430. *Id.* at 1079-81.

431. *Id.*

432. *Id.* at 1080.

433. *Id.*

Konecranes not to be a manufacturer, but rather only a “repairer” of the crane involved. In *Smith & Wesson*, there was no “physical harm” involved, only an alleged public nuisance arising out of the availability of the guns at issue. And, in *Dutchmen*, there was neither a product involved nor a manufacturer or seller of it. None of those cases involved, as did *Kovach* and *Deaton*, manufacturers and/or sellers facing both non-IPLA-based and IPLA-based liability for physical harm caused by a product.

II. STATUTES OF LIMITATION AND REPOSE

The IPLA contains a statute of limitation and a statute of repose for product liability claims. Indiana Code section 34-20-3-1 provides:

(a) This section applies to all persons regardless of minority or legal disability. Notwithstanding [Indiana Code section] 34-11-6-1, this section applies in any product liability action in which the theory of liability is negligence or strict liability in tort.

(b) Except as provided in section 2 of this chapter, a product liability action must be commenced:

(1) within two (2) years after the cause of action accrues; or

(2) within ten (10) years after the delivery of the product to the initial user or consumer.

However, if the cause of action accrues at least eight (8) years but less than ten (10) years after that initial delivery, the action may be commenced at any time within two (2) years after the cause of action accrues.⁴³⁴

Product liability cases involving asbestos products, however, have a unique statute of limitations. Indiana Code section 34-20-3-2(a) provides that “[a] product liability action based” upon either “property damage resulting from asbestos” or “personal injury, disability, disease, or death resulting from exposure to asbestos . . . must be commenced within two (2) years after the cause of action accrues.”⁴³⁵ That rule applies, however, “only to product liability actions against . . . persons who mined and sold commercial asbestos,” and to “funds that have, as a result of bankruptcy proceedings or to avoid bankruptcy proceedings, been created for the payment of asbestos related disease claims or asbestos related property damage claims.”⁴³⁶

Federal trial courts in Indiana issued two decisions during the 2008 survey period that disposed of cases because of the IPLA’s statute of repose. In the first case, *C.A. v. AMLI at Riverbend, L.P.*,⁴³⁷ four-year-old C.A. and three-year-old L.A. suffered serious burns on August 11, 2006, when an electric range

434. IND. CODE § 34-20-3-1 (2008).

435. *Id.* § 34-20-3-2(a).

436. *Id.* § 34-20-3-2(d). For a discussion of the asbestos-related statute of repose, see *Ott v. AlliedSignal, Inc.*, 827 N.E.2d 1144 (Ind. Ct. App. 2005).

437. No. 1:06-cv-1736-SEB-JMS, 2008 U.S. Dist. LEXIS 2558 (S.D. Ind. Jan. 10, 2008).

manufactured by Whirlpool fell on them in their apartment.⁴³⁸ The children's parents filed suit on their behalf in the Marion County Circuit Court on November 1, 2006, against, among others, Whirlpool and the apartment's property management company, AMLI.⁴³⁹ The plaintiffs asserted product liability claims against Whirlpool.⁴⁴⁰

Whirlpool filed a motion for summary judgment, arguing that the IPLA's statute of repose barred the plaintiffs' product liability action.⁴⁴¹ In support of its motion, Whirlpool designated an affidavit executed by Marvin McDowell, a Product Safety Manager at Whirlpool from 1990 to 2002.⁴⁴² McDowell asserted in his affidavit that he knew about the process Whirlpool used to apply serial numbers to electric ranges, and that, based upon the serial number on the electric range at issue, Whirlpool manufactured it in the fourteenth week of 1985.⁴⁴³

The plaintiffs moved to strike McDowell's declarations regarding the age of the electric range because he admitted in his deposition that his knowledge came from an oral history relayed to him and, therefore, was not really based upon personal knowledge.⁴⁴⁴ The court concluded that the plaintiffs' arguments were "unconvincing."⁴⁴⁵ According to the court, Whirlpool established that McDowell had sufficient personal knowledge regarding the serial number of the electric range at issue.⁴⁴⁶

Whirlpool further asserted that the range at issue already had been installed in the plaintiffs' apartment when AMLI purchased the apartment complex on July 13, 1993.⁴⁴⁷ Whirlpool designated the affidavit of Charlotte Sparrow, Vice President of AMLI Residential Partners, L.L.C.⁴⁴⁸ Sparrow asserted in her affidavit that a review of the AMLI records revealed no records to indicate that the electric range at issue in plaintiffs' apartment was ever removed or replaced after it was installed on July 13, 1993.⁴⁴⁹

Plaintiffs moved to strike Sparrow's affidavit, arguing that Sparrow failed to comply with Rule 56(e) of the Federal Rules of Civil Procedure, which requires

438. *Id.* at *2.

439. *Id.* at *2-3.

440. *Id.* at *2.

441. *Id.* at *3.

442. *Id.* at *6-7. As the party seeking summary judgment based on the Indiana Statute of Repose, Whirlpool had the initial burden of identifying evidence establishing that the electric range at issue was installed more than ten years before the accident. *Id.* at *14-15.

443. *Id.* at *7.

444. *Id.* at *10. Plaintiffs also pointed out that during McDowell's deposition, McDowell was not able to, on the spot, interpret the manufacturing year of a Whirlpool stove based on a serial number that contained an "X" and, therefore, plaintiffs argued that McDowell lacked knowledge about the manufacturing date of the stove at issue. *Id.* at *11-12.

445. *Id.* at *12.

446. *Id.* at *12-13.

447. *Id.* at *7.

448. *Id.*

449. *Id.*

that “‘sworn or certified copies of all papers . . . referred to in an affidavit shall be attached thereto or served therewith’” because Sparrow failed to attach the documents she relied upon, and therefore, plaintiffs’ counsel had no way of cross-examining the legitimacy of Sparrow’s conclusions.⁴⁵⁰ The court denied the plaintiffs’ motion to strike.⁴⁵¹ Because the thrust of Whirlpool’s argument was based upon an absence of records suggesting that the electric range was removed or replaced, Sparrow did not need to attach any records to support this argument.⁴⁵² Furthermore, the court pointed out that plaintiffs’ counsel failed to identify the documents they believed should have been attached to Sparrow’s affidavit.⁴⁵³

According to the court, the IPLA

provides for a two-year statute of limitations, limited by a ten-years-from-delivery clause . . . [a]n action must be brought within two years after it accrues, but in any event within ten years after the product is first delivered to the initial user or consumer, unless the action accrues more than eight but less than ten years after the product’s introduction into the stream of commerce.⁴⁵⁴

Whirlpool’s designation of evidence established that there were no genuine issues of material fact that the electric range was installed before 1993.⁴⁵⁵ Additionally, plaintiffs did not introduce any evidence of their own to contradict Whirlpool’s designation.⁴⁵⁶ Because plaintiffs did not file suit until November 1, 2006—more than ten years after the electric range was installed in the plaintiffs’ apartment—the court granted Whirlpool’s motion for summary judgment.⁴⁵⁷

In *Campbell v. Supervalu, Inc.*,⁴⁵⁸ plaintiffs Duane and Connie Campbell purchased ground beef at a Cub Food grocery store. They claimed that the beef was tainted with *E. coli* bacteria and made their son, Michael, seriously ill.⁴⁵⁹ They filed suit against Supervalu, Inc., the successor in interest to the Cub Food grocery store,⁴⁶⁰ approximately thirteen years after purchasing the ground beef alleging that Supervalu’s grocery store chain introduced the *E. coli* bacteria into

450. *Id.* at *8-9 (quoting FED. R. CIV. P. 56(e)).

451. *Id.* at *10.

452. *Id.* at *9.

453. *Id.*

454. *Id.* at *6 (internal quotation omitted) (citations omitted).

455. *Id.* at *13-14.

456. *Id.* at *14.

457. *Id.* at *15.

458. 565 F. Supp. 2d 969 (N.D. Ind. 2008).

459. *Id.* at 971. *Campbell* is also discussed *supra* Parts I.D.3 and I.E.

460. The Campbells purchased the beef at the Cub Food Store owned at the time by Rogers Markets, Inc. *Id.* at 971. On March 14, 1994, Rogers Markets, Inc. assigned to Supervalu its leasehold interest in the real estate where the Cub Food store was located. *Id.* at 973. Supervalu’s grocery chain is now known as Scott’s. *Id.* at 971.

the ground beef and, therefore, was liable under theories of negligence, product liability, and breach of implied warranty of fitness.⁴⁶¹

Supervalu filed a motion for summary judgment, asserting among other defenses, that the IPLA's statute of repose⁴⁶² time barred the Campbells' claims.⁴⁶³ The Campbells responded by presenting a two-fold argument. First, they maintained that Supervalu waived its statute of repose defense by failing to raise it in a previous motion to dismiss pursuant to Rule 12(g) of the Federal Rules of Civil Procedure.⁴⁶⁴ Second, the Campbells argued that the statute of repose did not apply to their "simple" negligence action.⁴⁶⁵

The court concluded that Supervalu did not waive the statute of repose defense by electing not to assert it in its first motion to dismiss.⁴⁶⁶ The court noted that Rule 12(g) is limited specifically to Rule 12 motions and does not operate to waive affirmative defenses, such as the statute of repose defense.⁴⁶⁷ Furthermore, there can be no waiver of the statute of repose defense because the defense that plaintiff has failed to state a claim can be raised: (1) "in any pleading [pursuant to] Federal Rule of Civil Procedure 7(a)"; (2) "in a motion for judgment on the pleadings"; or (3) "even at trial."⁴⁶⁸ Supervalu included the statute of repose defense as an affirmative defense in its answer, which was sufficient.⁴⁶⁹

The court also concluded that the IPLA's statute of repose applied to the Campbells' "simple negligence" action against Supervalu.⁴⁷⁰ In 1995, the Indiana General Assembly amended the IPLA, which expressly made it applicable to "all actions brought by a user or consumer against a manufacturer or seller for physical harm caused by a product regardless of the substantive legal theory or theories upon which the action is brought."⁴⁷¹ Thus, the language of the IPLA, according to the court, makes it clear that the Indiana General Assembly intended the IPLA to govern *all* product liability actions regardless of the underlying theory

461. *Id.* at 973.

462. IND. CODE § 34-20-3-1 (2008).

463. *Campbell*, 565 F. Supp. 2d at 973. Supervalu also argued it was entitled to summary judgment because "it did not own or operate the Cub Foods store on September 22, 1993, so it owed no duty to the Campbells and were not the cause in fact of [the alleged injury]." Supervalu further argued that there was no evidence that the good beef was tainted with *E. coli* bacteria or that it caused Michael's illness.

464. *Id.* at 974-75. Rule 12(g) of the Federal Rules of Civil Procedure provides that "a party that makes a motion under this rule must not make another motion under this rule raising a defense or objection that was available to the party but omitted from its earlier motion." FED. R. CIV. P. 12(g).

465. *Campbell*, 565 F. Supp. 2d at 974-75.

466. *Id.* at 975.

467. *Id.*

468. *Id.* (citing FED. R. CIV. P. 12(h)(2)).

469. *Id.*

470. *Id.* at 976.

471. *Id.*

of liability, including the Campbells' "simple negligence" theory.⁴⁷² The undisputed facts established that the ground beef was delivered to the Campbells on September 22, 1993.⁴⁷³ Because the Campbells did not file suit against Supervalu until September 8, 2006—nearly thirteen years after the cause of action accrued—the IPLA statute of repose barred each of their claims.⁴⁷⁴

III. EVIDENTIARY PRESUMPTION FOR COMPLIANCE WITH STATE-OF-THE-ART AND GOVERNMENT STANDARDS

The IPLA, via Indiana Code section 34-20-5-1, entitles a manufacturer or seller to a rebuttable presumption that the product causing the physical harm is not defective and that the product's manufacturer or seller is not negligent if, before the sale by the manufacturer, the product:

- (1) was in conformity with the generally recognized state of the art applicable to the safety of the product at the time the product was designed, manufactured, packaged, and labeled; or
- (2) complied with applicable codes, standards, regulations, or specifications established, adopted, promulgated, or approved by the United States or by Indiana, or by any agency of the United States or Indiana.⁴⁷⁵

Recent decisions in *Bourke v. Ford Motor Co.*,⁴⁷⁶ *Flis v. Kia Motors Corp.*⁴⁷⁷ and *Schultz v. Ford Motor Co.*⁴⁷⁸ all meaningfully address the foregoing

472. *Id.* (citing *Stegemoller v. ACandS, Inc.*, 767 N.E.2d 974, 975 (Ind. 2002)).

473. *Id.*

474. *Id.* The Seventh Circuit also dealt with a product liability statute of limitations issue, though it did so in the context of interpreting North Carolina law. In *Klein v. DePuy, Inc.*, 506 F.3d 553 (7th Cir. 2007), the Seventh Circuit affirmed the trial court's ruling that North Carolina's six year statute of repose applied to the plaintiff's claims against DePuy, an Indiana manufacturer of prosthesis, that the replacement hip was defective, and that the defects caused him injury and damage. *Id.* at 559. The court ruled that the traditional rule of *lex loci delicti*—the state where the last event necessary to make an actor liable for the alleged wrong takes place—governed the choice of law issue. *Id.* at 555 (citing *Simon v. United States*, 798, 805 (Ind. 2004)). Because the last event necessary to make DePuy liable occurred in North Carolina and the plaintiff resided, consulted with doctors, underwent hip surgery, and received post-surgery care in North Carolina, the North Carolina six-year statute of repose applied. *Id.* at 555-56.

475. IND. CODE § 34-20-5-1 (2008).

476. No. 2:03-CV-136, 2007 U.S. Dist. LEXIS 15871 (N.D. Ind. Mar. 5, 2007).

477. No. 1:03-cv-1567-JDT-TAB, 2005 WL1528227 (S.D. Ind. June 20, 2005).

478. 857 N.E.2d 977 (Ind. 2006). The Indiana Supreme Court decided *Schultz* during the 2006 survey period. *Id.* at 979. The plaintiff (Schultz) was injured when he lost control of his Ford Explorer. The vehicle rolled over and the roof collapsed, rendering Schultz a quadriplegic. *Id.* Schultz and his wife sued Ford, alleging negligence and defective roof design. *Id.* Ford denied liability and defended the suit. *Id.* During trial Ford relied in part on its compliance with Federal

presumptions.⁴⁷⁹ There were no significant published Indiana decisions during the 2008 survey period that addressed the IPLA's rebuttable presumptions.⁴⁸⁰

Motor Vehicle Safety Standard (FMVSS) 216, which governed minimum vehicle roof strength. *Id.* at 979 n.1. The trial court gave an instruction based on Indiana Code section 34-20-5-1. The instruction provided that Ford was entitled to a rebuttable presumption that it was not negligent and the Ford Explorer was not defective by virtue of its compliance with FMVSS 216. *Id.* at 979-80. The jury rendered a verdict in favor of Ford. *Id.* at 979. Schultz contended that the giving of the instruction was reversible error. *Id.* at 981. The Indiana Supreme Court disagreed and affirmed the trial court. *Id.* at 989. Relying on the last sentence contained in Indiana Evidence Rule 301—that presumptions shall have continuing effect—the Indiana Supreme Court rejected the bursting bubble theory of presumptions. *Id.* at 982-85. The court acknowledged that the presumption recognized by Indiana Code section 34-20-5-1 was not a presumption in a traditional legal sense. *Id.* at 985. Nonetheless, giving “continuing effect” to a presumption through a jury instruction furthered the policies that created the presumption in the first place. *Id.* at 986. By authorizing the instruction the court reasoned that it “recognize[d] the policy embodied by the [l]egislature in [the governmental compliance statute], regardless of whether the provision conform[ed] to the conventional definition of a legal ‘presumption.’” *Id.* at 986. Finally, the *Schultz* court addressed the concern that the use of the word “presumption” in an instruction could have a prejudicial effect on juries. *Id.* at 986-87. The court suggested that it might be less prejudicial to use words such as “infer” or “assume”; however, the inclusion of the verb “presume” and the noun “presumption” in the jury instruction at issue did not amount to reversible error because on balance the instruction was fair to both parties. *Id.* at 987. Therefore, the court affirmed the trial court’s decision to give the jury instruction. *Id.* at 989.

479. For a detailed discussion about all three cases, see Alberts, Petersen & Thornburg, *supra* note 98, at 1195-1200.

480. Two cases decided during the 2008 survey period referenced the rebuttable presumption. In both, the defendants attempted to establish the presumption at the summary judgment stage of the proceedings. In the first, *Fueger v. CNH America LLC (Fueger II)*, 893 N.E.2d 330 (Ind. Ct. App.), *trans. denied*, 898 N.E.2d 1233 (Ind. 2008), CNH America (Case) claimed that its skid loader was state-of-the art. *Id.* at 332. For a more detailed discussion of the claims at issue in *Fueger II*, see *supra* Part I.D.2. Case relied on expert testimony that established that many, if not all skid loaders possessed the same ignition feature as the product at issue and that the product complied with a standard, SAE J1388 Personal Protection for Skid Steer Loaders, promulgated by the Society of Automotive Engineers. *Fueger II*, 893 N.E.2d at 332-33. Plaintiff countered that the SAE standard was not promulgated by the government and that his expert testified that Case’s skid loader was not state of the art. *Id.* at 333. The court of appeals held that the conflicting expert testimony created a question of fact about whether the skid loader was state of the art. *Id.* The second case is an unpublished opinion, *Lind v. Menard, Inc.*, No. 45A04-0707-CV-408, 2008 WL 324018 (Ind. Ct. App. 2008). For a more detailed discussion of the facts of the *Lind* case, see *supra* note 134. In *Lind*, the seller argued that a drain cleaning product complied with applicable national standards entitling it to the presumption. *Id.* at *2-3. The seller relied on 15 U.S.C. § 1261 (2006) and 16 C.F.R. § 1500 (2008), which contained detailed labeling requirements for hazardous substances deemed “misbranded” if they did not contain the information specified in the sections. *Id.* Because the product’s label did not contain the signal words “DANGER,” “WARNING” or “CAUTION” as the standards specified, the court of appeals held that it was not entitled to the

IV. DEFENSES

A. *Use with Knowledge of Danger (Incurred Risk)*

Indiana Code section 34-20-6-3 provides that “[i]t is a defense to an action under [the IPLA] that the user or consumer bringing the action: (1) knew of the defect; (2) was aware of the danger in the product; and (3) nevertheless proceeded to make use of the product and was injured.”⁴⁸¹ Incurred risk is a defense that “involves a mental state of venturousness on the part of the actor and demands a subjective analysis into the actor’s actual knowledge and voluntary acceptance of the risk.”⁴⁸² It is a “complete” defense in that it precludes a defendant’s IPLA liability (in design and warning defect cases) if it is found to apply to a particular set of factual circumstances.⁴⁸³

Although there were no significant published decisions during the 2008 survey period that substantively addressed the incurred risk defense directly, practitioners should be mindful of the discussion in Part I.D., *supra*, particularly as the concept of “open and obvious danger” relates to the incurred risk defense.

B. *Misuse*

Indiana Code section 34-20-6-4 provides that it “is a defense to an action under [the IPLA] that a cause of the physical harm is a misuse of the product by the claimant or any other person not reasonably expected by the seller at the time the seller sold or otherwise conveyed the product to another party.”⁴⁸⁴

rebuttable presumption, and a question of fact precluded summary judgment concerning the adequacy of the seller’s warnings and instructions. *Id.* *3.

481. IND. CODE § 34-20-6-3 (2008).

482. *Cole v. Lantis Corp.*, 714 N.E.2d 194, 200 (Ind. Ct. App. 1999) (citing *Schooley v. Ingersoll Rand, Inc.*, 631 N.E.2d 932, 939 (Ind. Ct. App. 1994)).

483. *Vaughn v. Daniels Co. (W. Va.), Inc.*, 841 N.E.2d 1133, 1146 (Ind. 2006) (“Incurred risk acts as a complete bar to liability with respect to negligence claims brought under the [I]PLA.” (citing IND. CODE §§ 34-51-2-1 to -19)). On that point, the *Vaughn* decision is consistent with several earlier cases, *see, e.g.*, *Baker v. Heye-America*, 799 N.E.2d 1135, 1145 (Ind. Ct. App. 2003); *Hopper v. Carey*, 716 N.E.2d 566, 575 (Ind. Ct. App. 1999); *Cole*, 714 N.E.2d at 194, all of which stated that incurred risk is a complete defense in Indiana. *Cf. Mesman v. Crane Pro Servs.*, 409 F.3d 846 (7th Cir. 2005); *Coffman v. PSI Energy, Inc.*, 815 N.E.2d 522 (Ind. Ct. App. 2004). Although it held that no IPLA-based claims survived summary judgment, the *Vaughn* court did allow a common law negligence claim to proceed against Daniels and, accordingly, allowed the issue of Vaughn’s fault to remain in the case for the jury’s consideration solely in connection with the negligence claim. *Vaughn*, 841 N.E.2d at 1145-46. For a discussion about the nature of the negligence claim that the court allowed to survive summary judgment, *see* Alberts & Petersen, *supra* note 99, at 1037-39.

484. IND. CODE § 34-20-6-4 (2008). Stated in a slightly different way, misuse is a “use for a purpose or in a manner not foreseeable by the manufacturer.” *Henderson v. Freightliner, LLC*, No. 1:02-cv-1301-DFH-WTL, 2005 U.S. Dist. LEXIS 5832, at *10 (S.D. Ind. Mar. 24, 2005)

Knowledge of a product's defect is not an essential element of establishing the misuse defense. The facts necessary to prove the defense of "misuse" many times may be similar to the facts necessary to prove either that the product is in a "condition . . . not contemplated by reasonable" users or consumers under Indiana Code section 34-20-4-1(1)⁴⁸⁵ or that the injury resulted from "handling, preparation for use, or consumption that is not reasonably expectable" under Indiana Code section 34-20-4-3.⁴⁸⁶

Recent decisions in cases such as *Barnard v. Saturn Corp.*⁴⁸⁷ and *Burt v. Makita USA, Inc.*⁴⁸⁸ have resolved the applicability of the misuse defense as a matter of law. On the other hand, a 2005 case, *Henderson v. Freightliner, LLC*,⁴⁸⁹ held that the incurred risk issue should be presented to a jury.⁴⁹⁰

(quoting *Barnard v. Saturn Corp.*, 790 N.E.2d 1023, 1030 (Ind. Ct. App. 2003)).

485. IND. CODE § 34-20-4-1(1) (2008).

486. *Id.* § 34-20-4-3.

487. 790 N.E.2d 1023 (Ind. Ct. App. 2003). *Barnard* was a wrongful death action against the manufacturers of an automobile and its lift jack. *Id.* at 1026-27. Plaintiff's decedent was killed when he used a lift jack to prop up his vehicle while he changed the oil. *Id.* at 1027. The jack gave way, trapping the decedent underneath the car. *Id.* Both manufacturers provided safety warnings regarding proper use of the jack that the decedent did not follow. *Id.* at 1026-27. For example, the decedent failed to block the tires while he used the jack, he used the jack when the vehicle was not on a flat surface, and he got underneath his vehicle while it was raised on the jack—all of these actions were contrary to the warnings provided by the manufacturers. *Id.* at 1030. The trial court granted summary judgment to the defendants based upon product misuse, and the Estate appealed. *Id.* at 1025. The *Barnard* court ultimately affirmed the grant of summary judgment, holding as a matter of law that "no reasonable trier of fact could find that [the decedent] was less than fifty percent at fault for the injuries that he sustained." *Id.* at 1031. As such, the resolution of the case by the *Barnard* court was practically identical to how the court in *Coffman* resolved an incurred risk question. For a more detailed analysis of *Barnard*, see Alberts & Bria, *supra* note 103, at 1286-87.

488. 212 F. Supp. 2d 893 (N.D. Ind. 2002). In *Burt*, the plaintiff was injured by a circular saw's blade guard. *Id.* at 894. The district court held that there was

no evidence that the defendants should have foreseen that someone would leave the blade guard in an incompletely installed position, or that someone would attempt to use the saw with the blade guard improperly attached. To the contrary, the evidence suggest[ed] that the accident was unforeseeable, caused by a very unusual set of factual circumstances.

Id. at 898. Accordingly, the defendants were not liable because the manner in which the injury occurred was not reasonably foreseeable as a matter of law. *Id.* That being the case, the statutory definition in Indiana Code section 34-20-4-1(1) had not been met, which necessarily also meant that the defense of "misuse" had been established as a matter of law. *Id.*; see also Alberts & Boyers, *supra* note 23, at 1195-96.

489. No. 1:02-cv-1301-DFH-WTL, 2005 U.S. Dist. LEXIS 5832 (S.D. Ind. Mar. 24, 2005).

490. In *Henderson*, defendants argued that plaintiff Henderson began working on a diesel truck's air suspension system without first bleeding the air pressure, which was a misuse because the truck's service manual required that mechanics, among other things, "disconnect the leveling valve and exhaust all air from the air springs." *Id.* at *5, *10. Judge Hamilton decided that the

Although the *Vaughn* case involved the court's resolution of a "misuse" issue, the court addressed plaintiff's purported "misuse" not as an IPLA-based defense to a product liability claim, but rather as an element of the jury's consideration in connection with Vaughn's common law negligence claim.⁴⁹¹

The statutory definition of "misuse" quoted above appears to consider only the objective reasonableness of the foreseeability of the misuse by the seller and not the character of the misuser's conduct. That would seem to confirm that "misuse" should not be considered "fault" and, therefore, misuse should be a complete defense as is incurred risk.⁴⁹² Recent decisions, however, continue to reach inconsistent results when it comes to that issue. Three decisions, *Burt v. Makita USA, Inc.*,⁴⁹³ *Morgen v. Ford Motor Co.*,⁴⁹⁴ and *Indianapolis Athletic Club, Inc. v. Alco Standard Corp.*,⁴⁹⁵ have concluded that misuse is a complete defense. On the other hand, decisions in cases such as *Chapman v. Maytag Corp.*⁴⁹⁶ and *Barnard v. Saturn Corp.*⁴⁹⁷ have determined that the degree of a user's or a consumer's misuse is a factor to be assessed in determining that user's or consumer's "fault," which must then be compared with the "fault" of the alleged tortfeasor(s).⁴⁹⁸

There were no significant published decisions during the survey period that addressed misuse.

disputed issues of fact noted above precluded him from granting summary judgment that the misuse defense foreclosed recovery as a matter of law. *Id.* at *10-14.

491. *Vaughn v. Daniels Co. (W. Va.), Inc.*, 841 N.E.2d 1133, 1145-46 (Ind. 2006). For a more detailed discussion about the negligence claim that the *Vaughn* court allowed to survive against Daniels, see Alberts & Petersen, *supra* note 99, at 1037-39.

492. The district judge in *Chapman v. Maytag Corp.*, 297 F.3d 682 (7th Cir. 2002), recognized as much. He also recognized that the Indiana General Assembly did not specifically exempt misuse from the scope of the comparative fault requirement. *Id.* at 689.

493. 212 F. Supp. 2d 893, 897 (N.D. Ind. 2002).

494. 762 N.E.2d 137, 143 (Ind. Ct. App. 2002), *aff'd in part, vacated in part*, 797 N.E.2d 1146 (Ind. 2003).

495. 709 N.E.2d 1070, 1072 (Ind. Ct. App. 1999).

496. 297 F.3d 682 (7th Cir. 2002). In *Henderson*, Judge Hamilton cited *Chapman* for the proposition that "[t]he misuse defense is not necessarily a complete defense but is an element of comparative fault." *Henderson v. Freightliner, LLC*, NO. 1:02-cv-1301-DFH-WTL, 2005 U.S. Dist. LEXIS 5832, at *10 (S.D. Ind. Mar. 24, 2005) (citing *Chapman*, 297 F.3d at 689). For a more detailed analysis of *Chapman*, see Alberts & Boyers, *supra* note 23, at 1196-97.

497. 790 N.E.2d 1023 (Ind. Ct. App. 2003). According to the *Barnard* court, "the defense of misuse should be compared with all other fault in a case and does not act as a complete bar to recovery in a products liability action." *Id.* at 1029 (citing *Chapman*, 297 F.3d at 689). The *Barnard* court determined that the 1995 Amendments to the IPLA required all fault in cases to be comparatively assessed. *Id.* at 1029-30. "By specifically directing that the jury compare all 'fault' in a case, we believe that the legislature intended the defense of misuse to be included in the comparative fault scheme." *Id.* at 1030; *see also* Alberts & Bria, *supra* note 103, at 1286-87.

498. *See* IND. CODE § 34-20-8-1 (2008).

C. Modification and Alteration

Indiana Code section 34-20-6-5 provides:

It is a defense to an action under [the IPLA] that a cause of the physical harm is a modification or alteration of the product made by any person after the product's delivery to the initial user or consumer if the modification or alteration is the proximate cause of physical harm where the modification or alteration is not reasonably expectable to the seller.⁴⁹⁹

The modification/alteration defense is incorporated into the basic premise for product liability in Indiana as set forth in Indiana Code section 34-20-2-1. Indeed, the Indiana Code provides:

[A] person who sells, leases, or otherwise puts into the stream of commerce any product in a defective condition unreasonably dangerous to any user or consumer or to the user's or consumer's property is subject to liability for physical harm caused by that product to the user or consumer or to the user's or consumer's property if . . . the product is expected to and does reach the user or consumer without substantial alteration in the condition in which the product is sold by the person sought to be held liable under this article.⁵⁰⁰

The interplay between these two statutes as it relates to a product's condition is important for courts and practitioners to understand. As briefly discussed above in Part I.D.1., evidence of a product's condition after leaving the manufacturer's or seller's control is significant *both* as an IPLA-mandated threshold requirement for which the plaintiff bears the burden of proof, as well as an IPLA-based affirmative defense for which the defendant bears the burden of proof.⁵⁰¹

499. *Id.* § 34-20-6-5. Before the 1995 Amendments to the IPLA, product modification or alteration operated as a complete defense. *See* *Foley v. Case Corp.*, 884 F. Supp. 313, 315 (S.D. Ind. 1994).

500. IND. CODE § 34-20-2-1 (2008).

501. *Gaskin v. Sharp Electronics, Corp.*, No 2:05-CV-303, 2007 U.S. Dist. LEXIS 72347 (N.D. Ind. Sept. 26, 2007), briefly addressed the "alteration" defense. *Gaskin* involved allegations that a television caused a fatal house fire. *Id.* at *2. The court recognized that plaintiffs had to prove that the allegedly defective condition in the television at issue existed at the time it left the manufacturer's control in order to satisfy an essential element of their prima facie case. *Id.* at *22. Whether there was a substantial alteration in the television between the time when it left the manufacturer's control and the time when it came into the plaintiff's possession, according to the court, was an affirmative defense to the foregoing essential element of the plaintiff's prima facie case. *Id.* at *23. The plaintiffs in *Gaskin* pointed to evidence that the television was purchased only two months prior to the fire, it was purchased from Best Buy in pristine condition, it was not mishandled by anyone, and it was never in need of repair. *Id.* at *24. Accordingly, the court concluded that there was sufficient evidence to allow the jury to ultimately determine whether plaintiffs could satisfy their burden of establishing a prima facie case and whether defendants could

In a product liability case in Indiana, the IPLA requires the plaintiff, in order to establish his or her prima facie case, to demonstrate, first, that the product was in a defective condition at the time the seller or manufacturer conveyed it to another party,⁵⁰² and, second, that the product reached him or her “without substantial alteration.”⁵⁰³ If a plaintiff’s evidence is insufficient to meet those requirements as a matter of law either before or at trial, then he or she has failed to establish a prima facie product liability case.

The defendant, on the other hand, can and should introduce evidence to establish either that the product was substantially altered before it reached the plaintiff or that it was substantially modified or altered after delivery to the initial user or consumer and such modification or alteration proximately caused the damages alleged. Establishing the former negates a prima facie component of plaintiff’s case. Establishing the latter provides the basis for the statutory modification/alteration defense. In many cases, the same evidence will prove both points, such as a situation in which the initial user or consumer substantially altered the product before selling it to the plaintiff.

There were no significant published decisions during the survey period that addressed modification or alteration.

V. COMPARATIVE FAULT AND THE IPLA

The IPLA incorporates, in large measure, Indiana’s comparative fault principles for all product liability actions. A defendant cannot be “liable for more than the amount of fault . . . directly attributable to that defendant,” nor can a defendant “be held jointly liable for damages attributable to the fault of another defendant.”⁵⁰⁴ In addition, the IPLA requires the trier of fact to compare the “fault of the person suffering the physical harm, as well as the fault of all others whom caused or contributed to cause the harm.”⁵⁰⁵ For purposes of the IPLA, “fault” is

an act or omission that is negligent, willful, wanton, reckless, or intentional toward the person or property of others. The term includes the following:

- (1) Unreasonable failure to avoid an injury or to mitigate damages.
- (2) A finding under [Indiana Code section] 34-20-2 . . . that a person is subject to liability for physical harm caused by a product, notwithstanding the lack of negligence or willful, wanton, or reckless conduct by the manufacturer or seller.⁵⁰⁶

The IPLA also contemplates assessment of fault for non-parties:

satisfy their burden of demonstrating the existence of a substantial alteration. *Id.*

502. IND. CODE. § 34-20-4-1 (2008).

503. *Id.* § 34-20-2-1.

504. *Id.* § 34-20-7-1.

505. *Id.* § 34-20-8-1(a).

506. *Id.* § 34-6-2-45(a).

In assessing percentage of fault, the jury shall consider the fault of all persons who contributed to the physical harm, regardless of whether the person was or could have been named as a party, as long as the nonparty was alleged to have caused or contributed to cause the physical harm.⁵⁰⁷

The Indiana Court of Appeals's 2007 decision in *Dorman v. Osmose, Inc.*,⁵⁰⁸ is the most recent significant opinion in this area.⁵⁰⁹ There were no published product liability decisions during the survey period that addressed comparative fault issues in a substantive way.

VI. FEDERAL PREEMPTION

“‘[F]ederal law preempts state law in three situations: (1) when the federal statute explicitly provides for preemption; (2) when Congress intends to occupy the field completely; and (3) where state law stands as an obstacle to the accomplishment and execution of the full purposes and objections of Congress.’”⁵¹⁰

A. *Express Preemption*

In *Riegel v. Medtronic, Inc.*,⁵¹¹ the United States Supreme Court held that the express preemption provision of the Medical Device Amendments Act of 1976 (MDA)⁵¹² to the federal Food, Drug, and Cosmetic Act, prohibits common law claims challenging the safety of a medical device with respect to which the United States Food and Drug Administration (FDA) has granted premarket approval.⁵¹³

The MDA creates three levels of oversight for medical devices, depending upon the level of risk that the devices present.⁵¹⁴ Class I devices are subject to mere labeling requirements, the lowest level of supervision for medical

507. *Id.* § 34-20-8-1(b).

508. 873 N.E.2d 1102 (Ind. Ct. App. 2007), *trans. denied*, 891 N.E.2d 42 (Ind. 2008).

509. For a detailed analysis of *Dorman*, see Alberts, Petersen & Thornburg, *supra* note 98, at 1205-08.

510. *Thornburg v. Stryker Corp.*, No. 1:05-cv-1378-RLY-TAB, 2007 U.S. Dist. LEXIS 43455, *5 (S.D. Ind. July 3, 2007) (quoting *JCW Invs., Inc. v. Novelty, Inc.*, 482 F.3d 910, 918 (7th Cir. 2007)).

511. 128 S. Ct. 999 (2008).

512. 21 U.S.C. § 360k(a) (2006).

513. 128 S. Ct. at 1011. Justice Scalia wrote the court's opinion, joined by six other justices. *Id.* at 1002. Justice Stevens filed an opinion concurring in part and concurring in the judgment. *Id.* at 1011 (Stevens, J., concurring). Justice Ginsburg wrote a dissenting opinion. *Id.* at 1013 (Ginsburg, J., dissenting).

514. *Id.* at 1003 (majority opinion). Before the enactment of the MDA, individual states primarily controlled the introduction of new medical devices into the market. *Id.* The enactment of the MDA afforded the federal government a “regime of detailed federal oversight.” *Id.*

devices.⁵¹⁵ Class II devices are subject to “special controls’ such as performance standards and postmarket surveillance measures.”⁵¹⁶ Class III devices undergo a “rigorous regime of premarket approval.”⁵¹⁷ In the premarket approval process, the FDA reviews the device design, labeling, and manufacturing specifications and makes a determination as to whether the specifications provide a “reasonable assurance of safety and effectiveness.”⁵¹⁸

The MDA includes a pre-emption provision, § 360k(a), which provides as follows:

Except as provided in subsection (b) of this section, no State or political subdivision of a State may establish or continue in effect with respect to a device intended for human use any requirement—

- (1) which is different from, or in addition to, any requirement applicable under this chapter to the device, and
- (2) which relates to the safety or effectiveness of the device or to any other matter included in a requirement applicable to the device under this chapter.⁵¹⁹

Plaintiff Charles Riegel suffered serious injuries during an arterial insertion procedure when a balloon catheter manufactured by Medtronic, Inc. ruptured.⁵²⁰ The catheter is a Class III device that the FDA approved through the premarket approval process.⁵²¹ Riegel and his wife sued Medtronic, alleging that the catheter’s manufacture, design, and labeling “violated New York common law, and that these defects caused Riegel to suffer severe and permanent injuries.”⁵²²

The district court held that § 360k(a) pre-empted the Riegels’ causes of action for strict liability, breach of implied warranty, negligence and negligent manufacturing.⁵²³ The district court also held that the MDA pre-empted the wife’s loss of consortium claim to the extent it was derived from the preempted claims.⁵²⁴ The Second Circuit Court of Appeals affirmed.⁵²⁵ The United States Supreme Court agreed with both the district court and Second Circuit, holding that § 360k(a) precluded plaintiffs’ common law claims that challenged the safety or effectiveness of the catheter.⁵²⁶

Based upon the language of § 360k(a), the *Riegel* Court addressed the following issues: (1) whether the federal government established requirements

515. *Id.*

516. *Id.*

517. *Id.* at 1003-04.

518. *Id.*

519. 21 U.S.C. § 360k(a) (2006); *see also Riegel*, 128 S. Ct. at 1003.

520. *Riegel*, 128 S. Ct. at 1005.

521. *Id.*

522. *Id.*

523. *Id.* at 1005-06.

524. *Id.* at 1006.

525. *Id.*

526. *Id.* at 1011.

applicable to Medtronic's catheter; and (2) whether the plaintiffs' common-law claims were based on New York requirements with respect to the device that are "different from, or in addition to" the federal ones, and that relate to safety and effectiveness."⁵²⁷

The Court determined that the federal government had, in fact, established requirements applicable to the catheter.⁵²⁸ The Court noted that the rigorous pre-market approval process is "specific to individual devices."⁵²⁹ The Court contrasted the catheter, which underwent the rigorous premarket approval regime before entering to the market, to the device at issue in *Medtronic, Inc. v. Lohr*,⁵³⁰ which did not undergo the premarket approval process before entering the market, but rather, was granted approval under a grandfathering process.⁵³¹ The Court in *Lohr* held that the grandfather approval process did not impose device-specific requirements.⁵³² The Court proclaimed:

Unlike general labeling duties, premarket approval is specific to individual devices. And it is no sense an exemption from federal safety review—it *is* federal safety review. Thus, the attributes that *Lohr* found lacking in § 510(k) review are present here. While § 510(k) is focused on equivalence, not safety, pre-market approval is focused on safety, not equivalence. While devices that enter the market through § 510(k) have never been formally reviewed under the MDA for safety or efficacy, the FDA may grant pre-market approval only after it determines that a device offers a reasonable assurance of safety and effectiveness. And while the FDA does not require that a device allowed to enter the market as a substantial equivalent take any particular form for any particular reason, the FDA requires a device that has received premarket approval to be made with almost no deviations from the specifications in its approval application, for the reason that the FDA has determined that the approved form provides a reasonable assurance of safety and effectiveness.⁵³³

With regard to the second issue, the Court determined that § 360k(a) preempted the Riegels' common-law claims because their claims were based upon New York "requirements" with respect to the catheter, that such requirements were "different from, or in addition to" the federal ones, and that they related to the safety and effectiveness of the device.⁵³⁴ Adhering to the view of five Justices in *Lohr*—that common-law negligence and strict liability claims imposed "requirements"—the Court recognized that a state tort law requiring a

527. *Id.* at 1006 (quoting 21 U.S.C. § 360k(a) (2006)).

528. *Id.* at 1007.

529. *Id.*

530. 518 U.S. 470 (1996).

531. *Riegel*, 128 S. Ct. at 1006-07.

532. *See id.* at 1006.

533. *Id.* at 1007 (internal quotations and citations omitted).

534. *Id.* at 1007-11.

device to be safer than the model approved by the FDA would disrupt the federal regulatory scheme, and that the state “requirements” were, therefore, preempted.⁵³⁵ The majority opinion also addressed the dissent’s view that Congress, in enacting the express preemption provision of the MDA, did not intend to preempt state tort remedies.⁵³⁶ The majority rejected the dissent’s view and emphasized that “[i]t is not [the Court’s] job to speculate upon congressional motives,” and that the preemption statute, by its plain language, overtly prohibits state tort claims.⁵³⁷

As a final point, the Court declined to address the Riegels’ argument that the state requirements for medical devices were not different from or in addition to the federal requirements; rather, they paralleled the federal requirements.⁵³⁸ The Riegels raised such an argument for the first time in their merits brief before the Supreme Court.⁵³⁹ They did not present that argument in their briefs to the Second Circuit or in their petition for certiorari.⁵⁴⁰

B. Conflict Preemption

Tucker v. SmithKline Beecham Corp.,⁵⁴¹ is a wrongful death claim against SmithKline Beechman Corp. (GSK), arising out of a September 2002 suicide of man who had been taking the pharmaceutical drug, Paxil.⁵⁴² The lawsuit alleged that GSK breached its duty to warn about “an increased risk of suicide in adults taking Paxil.”⁵⁴³ The court initially dismissed all of the state law claims that were based upon an inadequate warning theory, finding them to be pre-empted because the Food and Drug Administration (FDA) required GSK to include language in its drug labels that conflicted with the warning that plaintiff argued was required under Indiana law.⁵⁴⁴ On reconsideration, however, the court vacated its judgment.⁵⁴⁵

GSK argued that conflict pre-emption⁵⁴⁶ precluded the state law claims because they

directly conflicted with (1) the FDA-mandated labeling for Paxil; (2) the FDA’s “consistent and repeated” determinations, during the period

535. *Id.* at 1007-08.

536. *Id.* at 1009; *see also id.* at 1015 (Ginsberg, J., dissenting).

537. *Id.* at 1009 (majority opinion).

538. *Id.* at 1011.

539. *Id.*

540. *Id.*

541. 596 F. Supp. 2d 1225 (S.D. Ind. 2008).

542. *Id.* at 1226-27.

543. *Id.* at 1227.

544. *Id.*

545. *Id.*

546. “Conflict preemption arises when it is impossible to comply with both state and federal requirements or when state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *Id.*

before and after [the suicide] in September 2002, that there is no scientific basis for the suicide warning [plaintiff] claims GSK should have included in its labeling for adults; and (3) the FDA's statement in May 2006 that it regards the additional warnings advocated by [plaintiff] as "false, misleading, and potentially harmful to the public," and that placement of those warnings on the label for Paxil would render the drug misbranded and unlawful as a result.⁵⁴⁷

The plaintiff countered by arguing that there is no basis for conflict pre-emption because the FDA did not preclude GSK from including in its label "Paxil-specific warning language, such as contained in its 2006 label."⁵⁴⁸ The plaintiff further argued that even if there was a basis for conflict pre-emption at the time the matter was in litigation, there was no conflict in 2002 when GSK could have warned about the suicide risks specific to the case at hand.⁵⁴⁹

In vacating the judgment in favor of plaintiff, the court first observed that pursuant to FDA regulations, drug manufacturers have a continuous duty to revise warnings.⁵⁵⁰ The FDA regulation in place controls the labeling requirements for prescription drugs:

Warnings. Under this section heading, the labeling shall describe serious adverse reaction and potential safety hazards, limitations in use imposed by them, and steps that should be taken if they occur. *The labeling shall be revised to include a warning as soon as there is reasonable evidence of an association of a serious hazard with a drug; a causal relationship need not have been proved.*⁵⁵¹

Although GSK argued that the FDA retained exclusive authority over the labeling requirements for prescription drugs, the FDA regulations clearly impose upon the drug manufacturer the "ongoing ability, authority, and responsibility to strengthen a label."⁵⁵² The FDA may later disapprove of strengthening a label, but "the FDA's power to disapprove does not make the manufacturer's voluntarily strengthened label a violation of federal law" that is required for conflict pre-emption.⁵⁵³ The regulations that governed drug manufacturers in 2002 were similar to the current FDA regulations.⁵⁵⁴

The preamble to the FDA's regulations "asserted that state failure-to-warn lawsuits, such as the one brought . . . here, have directly threatened the agency's ability to regulate manufacturer dissemination of risk information for prescription

547. *Id.*

548. *Id.*

549. *Id.*

550. *Id.* at 1228.

551. 21 C.F.R. § 201.80(e) (2008) (emphasis added).

552. *Tucker*, 596 F. Supp. 2d at 1229.

553. *Id.*

554. *Id.* at 1229-30. The obligations will likely remain in effect in the future. *Id.* at 1230 n.4.

drugs.”⁵⁵⁵ However, the court gave the FDA’s position on preemption little weight as its recent regulations, which supported pre-emption, were promulgated without notice and comment.⁵⁵⁶

The court also gave little weight to GSK’s argument that a conflict exists in that “drug manufacturers will be forced to walk a tightrope between being sanctioned by the FDA for ‘overwarning’ and being sanctioned by the court for ‘underwarning’” if the plaintiff was allowed to pursue her state law claims.⁵⁵⁷ The court found GSK’s argument flawed in one key respect:

[I]n spite of the FDA’s direction regarding Paxil’s label in May 2007, GSK still had (and has) the obligation to revise its label to strengthen a warning upon reasonable evidence of an association of a serious hazard, particularly with respect to this individual drug. If GSK were to receive such evidence, it would be obligated to revise its label in spite of the FDA’s direction in May 2007. In fact, when it issued its instruction that GSK revise Paxil’s label, the FDA advised GSK that if GSK disagreed with the FDA’s belief that Paxil-specific analysis should be included in the SSRI labeling revisions, GSK could request a meeting with the FDA. The FDA’s offer, upon which GSK did not act, is consistent with GSK’s ongoing obligations under the regulations. In other words, the FDA’s revisions were not necessarily the final word on Paxil’s label and did not put GSK into a position where it was impossible for GSK to comply with both state and federal law.⁵⁵⁸

Accordingly, the court vacated its judgment, thus, reopening the state law tort claims.⁵⁵⁹

The Indiana Court of Appeals also weighed in on federal preemption in *Roland v. General Motors Corp.*⁵⁶⁰ The court held that the plaintiff’s state law tort claims were pre-empted because they conflicted with the Federal Motor Vehicle Safety Standard (FMVSS) 208, which gave car manufacturers the choice to install lap only or lap/shoulder safety belts.⁵⁶¹ On July 3, 2004, plaintiff, Jenean Roland, was involved in an accident with another vehicle while driving a 1998 Chevrolet Cavalier convertible manufactured by General Motors (GM).⁵⁶² Roland’s ten-year-old son was in the rear center seat, restrained by a “Type-1 two point (lap only) safety belt with a manual adjusting device.”⁵⁶³ At the time of the accident, the Cavalier complied with all FMVSS regulations, including FMVSS 208, which authorized GM to choose to install either a “Type-1 or Type-2

555. *Id.* at 1230 (internal quotation omitted).

556. *Id.* at 1231-33 (granting only *Skidmore* deference).

557. *Id.* at 1233-35.

558. *Id.* at 1235-36.

559. *Id.* at 1238.

560. 881 N.E.2d 722 (Ind. Ct. App.), *trans. denied*, 898 N.E.2d 1218 (Ind. 2008).

561. *Id.* at 729.

562. *Id.* at 724.

563. *Id.*

(lap/shoulder) safety belt, with either an automatic or manual adjusting device.”⁵⁶⁴

Ms. Roland and her son filed suit in Indiana state court against GM, claiming that the Cavalier was defectively and negligently designed because GM failed to install a lap/shoulder belt in the center rear seat.⁵⁶⁵ In response, GM filed a motion for partial summary judgment arguing that “any claim predicated on [GM]’s choice of the lap belt option in the center rear seat was pre-empted” by FMVSS 208, which was promulgated by the Department of Transportation (DOT) and its subdivision, the National Highway Traffic Safety Administration (NHTSA).⁵⁶⁶ The trial court granted GM’s motion for partial summary judgment, which the Indiana Court of Appeals affirmed.⁵⁶⁷

On appeal, the Rolands acknowledged that FMVSS 208 provided GM with the option of installing either a lap only or lap/shoulder seat belt, but the Rolands argued that the existence of such a choice does not foreclose their state law claim because FMVSS 208 is only “a minimum safety standard that may be augmented by state common law” and accordingly, “[GM was] negligent in failing to do more than the minimum require[ments imposed by federal law].”⁵⁶⁸ In support of their position, the Rolands cited the U.S. Supreme Court decision, *Sprietsma v. Mercury Marine*.⁵⁶⁹ In *Sprietsma*, the plaintiff’s wife was killed in a boating incident when an outboard motor’s propeller struck her.⁵⁷⁰ In *Spreitsma*, plaintiff filed a state common law tort action against the manufacturer of the motor, arguing that the motor was unreasonably dangerous because it did not incorporate a propeller guard.⁵⁷¹ The Court held that plaintiff’s claims were not preempted by the Coast Guard’s decision not to adopt a regulation requiring propeller guards because, although the Coast Guard intentionally declined to require propeller guards, it did not convey an authoritative message of a federal policy against them.⁵⁷² Accordingly, the Rolands argued that the NHTSA’s decision to provide automobile manufactures the choice of seat belt restraints is essentially the same as the Cost Guard’s decision in *Sprietsma*.⁵⁷³

In 1966, Congress enacted the federal Safety Act as a means of curbing the “soaring rate of death and debilitation on the Nation’s highways.”⁵⁷⁴ The Safety Act includes a pre-emption provision “that explicitly pre-empts any [s]tate legislative or regulatory enactment that covers the same aspect of performance

564. *Id.*

565. *Id.*

566. *Id.*

567. *Id.* at 724, 729.

568. *Id.* at 725.

569. 537 U.S. 51 (2002).

570. *Id.* at 54.

571. *Id.* at 55.

572. *Id.* at 66-67.

573. *Roland*, 881 N.E.2d at 728-29.

574. *Id.* at 725 (quoting S. REP. NO. 89-301, at 1 (1966), reprinted in 1996 U.S.C.C.A.N. 2709, 2709).

as a [f]ederal standard but is not identical to the [f]ederal standard.”⁵⁷⁵ The Safety Act also contains a “savings clause,” which provides that “compliance with a [f]ederal motor vehicle safety standard does not exempt any person from any liability under common law.”⁵⁷⁶

In another U.S. Supreme Court case, *Geier v. American Honda Motor Co.*,⁵⁷⁷ the Court recognized that “the saving clause reflects a congressional determination that occasional nonuniformity is a small price to pay for a system in which juries not only create, but also enforce, safety standards, while simultaneously providing necessary compensation to victims.”⁵⁷⁸ However, the Court concluded that the saving clause “does not bar the ordinary working of conflict pre-emption principles.”⁵⁷⁹ Indeed, in *Geier*, the court held that FMVSS 208 preempted a state common law tort action where the plaintiff claimed the defendant automobile manufacturer negligently failed to install air bags in various vehicles, which was a choice provided to the manufacturer pursuant to FMVSS guidelines.⁵⁸⁰ The Court remarked that the Department of Transportation (DOT) deliberately chose to provide automobile manufacturers with a range of choices among various passive restraint devices in order to promote FMVSS 208 safety objectives.⁵⁸¹ The Court ultimately held that the common law tort claims were preempted because they would present a hindrance to the variety of passenger restraint choices available to automobile manufacturers.⁵⁸²

The court of appeals in *Roland* noted that the NHTSA’s regulation of seat belts was deliberate and motivated by the same policy concerns identified by the Supreme Court in *Geier*.⁵⁸³ According to the *Roland* court, the NHTSA’s decision to provide automobile manufactures the choice of seat belts restraints is not the same as the Coast Guard’s decision in *Sprietsma*.⁵⁸⁴ Indeed, as the *Roland* court wrote, “*Sprietsma* involved a complete absence of regulatory action

575. *Id.* at 726 (internal quotations omitted).

576. *Id.* (internal quotations omitted).

577. 529 U.S. 861 (2000).

578. *Id.* at 871.

579. *Id.* at 869.

580. *Id.* at 865.

581. *Id.* at 875. The range of “choices would bring about a mix of different devices introduced gradually over time; and FMVSS 208 would thereby lower costs, overcome technical safety problems, encourage technological development, and win widespread consumer acceptance.” *Id.*

582. *Id.* at 886.

583. *Roland v. Gen. Motors Corp.*, 881 N.E.2d 722, 727 (Ind. Ct. App.), *trans denied*, 898 N.E.2d 1218 (Ind. 2008). The Rolands sought to distinguish *Geier* on grounds that it involved only passive restraints (airbags) as opposed to active restraints (seat belts); however, the court found that *Geier* applied regardless of the type of restraint at issue as the policy concerns underlying the regulations were the same. *Id.* The *Roland* court followed several other jurisdictions in making this decision. *See, e.g.*, *Carden v. Gen. Motors Corp.*, 509 F.3d 227 (5th Cir. 2007), *cert. denied*, 128 S. Ct. 2911 (2008).

584. *Id.* at 728-29.

with regard to propeller guards. The present case, however, involves a choice made available as part of the comprehensive regulatory action expressed in FMVSS 208.”⁵⁸⁵ Accordingly, the court held that FMVSS 208 preempted the Rolands’ common law tort action.⁵⁸⁶

CONCLUSION

The 2008 survey period was another productive one in terms of the number of decisions issued by state and federal courts in Indiana. All in all, however, the 2008 survey period demonstrated that, although more than a decade has passed since the Indiana General Assembly made sweeping revisions to the IPLA in 1995, some of the IPLA’s provisions continue to challenge both courts and practitioners alike.

585. *Id.* at 729.

586. *Id.*

2008 SURVEY OF THE LAW OF PROFESSIONAL RESPONSIBILITY

CHARLES M. KIDD*

INTRODUCTION

During this survey period, there were a number of cases in several different areas of the law that warrant discussion. Of course, the disciplinary arena is always a productive vineyard of cases of interest in professional responsibility. This year, there were two cases of particular interest because of the conduct by the lawyers therein. *In re Colman*¹ and *In re Fieger*² involved issues of conduct that most lawyers would never even dream of committing. Even more interesting are the lawyers' reactions to such accusations. In both cases, there appeared to be no recognition that their conduct could even be questioned, let alone be criticized.

There are also a couple of legal malpractice cases worthy of consideration.³ In both cases, the underlying legal issues are complex but the ethics issues involved are worth a moment of discussion. Finally, a claim of prosecutorial misconduct was raised in a criminal case.⁴ The case is particularly interesting because it caused the Indiana Supreme Court to consider the issue of whether such conduct put the criminal defendant in grave peril.⁵ In the end, none of these issues are things that would normally confront beginners but, rather, arise in veteran lawyers' practices. That makes their resolution by the Indiana Supreme Court all the more important because of its relevance to the practicing lawyers.

I. DISCIPLINARY ISSUES

A. *Anything Anybody Will Pay: The Case of David Colman*

During the survey period, the supreme court issued a per curiam opinion in the attorney discipline case of *In re Colman*.⁶ For his misconduct, the respondent lawyer received a suspension from the bar for at least three years before he may seek leave to apply for reinstatement.⁷ Such a suspension is a severe sanction in attorney discipline, but is significantly better than two of the justices on the court

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1. 885 N.E.2d 1238 (Ind. 2008) (per curiam).

2. 887 N.E.2d 87 (Ind. 2008).

3. See *Carlson v. Sweeney, Dabagia, Donoghue, Thorne, Janes & Pagos*, 895 N.E.2d 1191 (Ind. 2008); *Querrey & Harrow, Ltd. v. Trancon. Ins. Co.*, 885 N.E.2d 1235 (Ind. 2008).

4. *Bassett v. State*, 895 N.E.2d 1201 (Ind. 2008), cert. denied, 129 S. Ct. 1920 (2009).

5. *Id.* at 1208-09.

6. 885 N.E.2d 1238 (Ind. 2008) (per curiam).

7. *Id.* at 1244.

wanted.⁸ The case represents not just a look at the ways in which a lawyer can get in trouble, but some insight into the thinking of the supreme court justices as they review these kinds of cases.

Many attorney discipline cases are resolved through a settlement between the respondent lawyer and the Indiana Disciplinary Commission (Disciplinary Commission).⁹ The disciplinary action in *Colman*, however, was tried to completion before a hearing officer appointed by the court.¹⁰ The hearing officer found in favor of the Disciplinary Commission on all three counts alleged against the respondent lawyer.¹¹ The court found that the hearing officer's conclusions were supported by the evidence and accepted them completely.¹²

In count one, the respondent, Colman, first became acquainted with G.A., an elderly gentleman, when he represented him in a civil lawsuit.¹³ Some years later, G.A. broke his hip and was hospitalized. G.A. called the respondent to the hospital to discuss G.A.'s desire to have a will.¹⁴ G.A. told the respondent that he wanted the respondent to be his beneficiary.¹⁵ The respondent contacted another attorney named Paul Watts to prepare the will, name the respondent as the primary beneficiary, and name the respondent's son as the contingent beneficiary. Watts prepared the will in keeping with Colman's instructions but "did not discuss the will with G.A., nor did he charge G.A. for his services."¹⁶ He likewise did not do any sort of assessment as to what G.A.'s mental condition was at this time.¹⁷ The respondent lawyer did obtain a written statement from a psychiatrist as to G.A.'s competence to sign the will.¹⁸ The supreme court noted that when Watts' file was produced as part of Colman's disciplinary action, it "consisted of an empty file folder and a post-it note."¹⁹ A paralegal for Watts appeared at the hospital with the will, reviewed it with G.A. and, after G.A. had

8. Two Justices authored separate opinions in this case. They agreed with the outcome but not the severity of the sanction imposed on Colman. *See id.* at 1245 (Shepard, C.J., dissenting); *id.* at 1246 (Dickson, J., dissenting) (both arguing for permanent disbarment).

9. Such settlements are contemplated by Indiana Admission and Discipline Rule 23, section 11(c). IND. ADMIS. & DISC. R. 23(11)(c). These agreements, however, are conditional in the sense that despite the parties' agreement, the supreme court can reject a proposal that the court does not believe is an appropriate resolution of the case. *Id.*

10. *Colman*, 885 N.E.2d at 1240. Under Admission and Discipline Rule 23(14)(h), the hearing officer is required to render a written report—essentially findings of fact and conclusions of law—to the court to determine whether the Disciplinary Commission has proved its case by the standard of clear and convincing evidence. IND. ADMIS. DISC. R. 23(14)(h).

11. *Colman*, 885 N.E.2d at 1240.

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

consulted with the respondent lawyer, had G.A. execute the will.²⁰ The supreme court found that even though Watts put G.A.'s will on paper, the respondent lawyer "actively participated in the preparation of the will" in which he was the primary beneficiary.²¹

A little more than a week later, the respondent lawyer petitioned to have a guardian appointed over G.A.²² In the petition to establish guardianship, the respondent affirmatively stated that he was G.A.'s lawyer.²³ The respondent was thereafter appointed as G.A.'s guardian.²⁴ He then moved G.A. from the hospital to a nursing home.²⁵ Three weeks later, G.A. decided he wanted to leave the nursing home but was prevented from doing so.²⁶ Through the assistance of a friend, G.A. was able to retain another lawyer and challenge the guardianship.²⁷ This put the respondent lawyer in a completely adverse position as to G.A.'s challenge to the guardianship.²⁸

In its discussion, the supreme court immediately noted that the respondent's participation in the preparation of G.A.'s will constituted a violation of Rule 1.8(c), "which prohibits a lawyer from preparing an instrument for a non-relative that gives the lawyer or a person related to the lawyer a substantial gift."²⁹ This is an old concept in the law of professional responsibility that was even mentioned in the original Code of Professional Responsibility—adopted in Indiana in the 1970's.³⁰ Note that the supreme court did not discuss (and did not hesitate to find) that the respondent lawyer's *participation* in the creation of G.A.'s will was essentially synonymous with his *creation* of the will. It is a fair reading of the opinion to infer that whatever the extent of Watts's involvement in the creation of G.A.'s will, the responsibility for the will lay at the respondent's feet.³¹

There was an additional allegation connected with this count of the disciplinary case—the guardianship. The Disciplinary Commission and the court

20. *Id.* at 1240-41.

21. *Id.* at 1243. Watts is not mentioned after this point. Although the court does not make an affirmative statement about Watts, their recitation of his involvement in the preparation of G.A.'s will leaves the clear impression that the court is critical of his behavior here. *See id.* at 1240, 1243.

22. *Id.* at 1241.

23. *Id.* at 1243.

24. *Id.* at 1241.

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.* at 1243 (citing IND. PROF. CONDUCT R. 1.8(c)).

30. Under the Code, Ethical Consideration 5-5 provided: "Other than in exceptional circumstances, a lawyer should insist that an instrument in which his client desires to name him beneficially be prepared by another lawyer *selected by the client*." IND. CODE OF PROF. RESPON. 5-5 (emphasis added).

31. *Colman*, 885 N.E.2d at 1243.

were critical of the respondent's treatment of G.A.'s guardianship proceeding.³² The court highlighted its concern by noting that the respondent contended that his participation in the guardianship proceeding was in the role of "G.A.'s guardian, not as his attorney."³³ The court was cognizant of the fact that when the respondent filed the guardianship petition, he explicitly stated that he was G.A.'s lawyer.³⁴ The court was also able to infer that G.A. believed the respondent to be his lawyer.³⁵ By becoming G.A.'s guardian, the respondent was put in complete charge of all the property he stood to inherit under G.A.'s will.³⁶ The court reasoned that such total control over these assets could have provided an incentive for the respondent to preserve G.A.'s property rather than expend it for G.A.'s care and comfort.³⁷ By putting himself in that position, the respondent had an impermissible conflict of interest and thereby violated Rule 1.7(b).³⁸ When analyzing this conduct under Rule 1.7(b), the conflict is clearly between G.A.'s interest in managing his own life and property, versus the respondent's interest in protecting his expectation in all the property under G.A.'s will. As the court noted, the guardianship allowed the respondent to essentially lock in his right to G.A.'s estate by freezing G.A. out of the ability to dispose of property.³⁹

The court noted that the hearing officer found in the respondent's favor on count two; thus, the court did not disturb that result.⁴⁰

In count three, the hearing officer found that the respondent had committed misconduct based on the following facts. In 1995, respondent represented a client identified as M.M. in two matters: (1) a criminal case in Evansville for allegedly possessing marijuana and (2) a dispute with Indiana University in Bloomington over a grade M.M. received in a course.⁴¹ There was "no written fee agreement"⁴² with M.M., the terms of the representation were not clearly

32. *Id.* at 1241, 1243.

33. *Id.* at 1243.

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*; see also IND. PROF. CONDUCT R. 1.7(b). Rule 1.7 provides,

(a) [A] lawyer shall not represent a client if . . . the representation of [that client may] be materially limited by the lawyer's responsibilities to another client, a former client or to a third person or by a personal interest of the lawyer[, unless] . . .

(b) (1) The lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; and . . .

(4) The client gives informed consent in writing.

39. *Colman*, 885 N.E.2d at 1243.

40. *Id.* at 1241.

41. *Id.*

42. There is no requirement for a written fee agreement in criminal defense representations

established,” the respondent did not bill M.M., and respondent never told M.M. what he owed.⁴³ On March 31, 1995, M.M. was arrested again after a confidential informant bought marijuana from him.⁴⁴ A search of M.M.’s Bloomington condominium revealed 100 pounds of marijuana and almost \$200,000 in cash.⁴⁵ Somehow, the authorities failed to find \$20,000 hidden in the condominium and \$30,000 in a bank safe deposit box.⁴⁶ M.M. told the respondent where to find the money and respondent recovered it almost immediately.⁴⁷ Respondent deposited the \$50,000 into his personal account at the Indiana University Credit Union and not in an attorney trust account.⁴⁸ Respondent thereby commingled his own funds with those belonging to his client.⁴⁹ The respondent suggested that M.M. transfer ownership of his condominium to the respondent for the purposes of avoiding an eventual forfeiture of the condominium as part of the criminal prosecution and satisfying part of the respondent’s legal fee.⁵⁰ About three weeks after M.M.’s arrest, the respondent appeared at the Marion County Jail with a document he prepared entitled “Sale Agreement” wherein the quid pro quo for the condominium and its contents was the respondent’s pledge to forego attorney fees in the Indiana University matter and the criminal cases.⁵¹ The agreement also contained a provision wherein M.M. agreed to reimburse the respondent for all expenses associated with the condominium if it was eventually forfeited.⁵² Furthermore, it was eventually determined that M.M. had about \$65,000 in equity in the condominium and its contents.⁵³ The respondent told M.M. not to tell anyone about the transaction, and M.M. did not even tell the lawyer that was handling the federal forfeiture case.⁵⁴ The respondent, meanwhile, did not assume the mortgage on the condominium or make timely payments.⁵⁵ As a result of the

under Indiana Rule of Professional Conduct 1.5. Contingent fee agreements must be in writing under Rule 1.5(c) but those are not permitted in a criminal case and there was no likelihood of the contingent fee being efficacious in the dispute with Indiana University. It is clear from rule 1.5 that the terms and amounts of the fee agreement *should* be in writing, but it is not clear that a written agreement was *required* in this context. See IND. PROF. CONDUCT R. 1.5.

43. *Colman*, 885 N.E.3d at 1241.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.* at 1241-42.

52. *Id.* at 1242. Another lawyer, designated as R.K. by the supreme court, represented M.M. in the federal forfeiture case. *Id.* Neither M.M. nor the respondent told R.K. about the deal transferring the condominium to the respondent. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

federal criminal action, M.M. went to prison and asked respondent for some of his money back.⁵⁶ The respondent refused.⁵⁷

The supreme court found that the respondent mishandled M.M.'s funds by failing to deposit them in an approved trust account, thus commingling the funds with his own.⁵⁸ The court also agreed with the hearing officer's determination that the sale agreement on the condominium was unreasonable because it did not set out the value of the legal services the respondent had performed or would perform in the future.⁵⁹ As such, this constituted a business transaction with a client in violation of Rule 1.8.⁶⁰ The court also found that the respondent was guilty of charging M.M. an unreasonable fee in violation of Rule 1.5.⁶¹ Having

56. *Id.*

57. *Id.*

58. *Id.* at 1243; *see also* IND. PROF. CONDUCT R. 1.15(a). Rule 1.15(a) provides in pertinent part:

A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person.

IND. PROF. CONDUCT R. 1.15(a). Similarly, IND. ADMIS. DISC. R. 23 § 29(a)(1) provides in pertinent part:

Attorneys shall deposit all funds held in trust in accounts clearly identified as "trust" or "escrow" accounts, referred to herein as "trust accounts" and shall inform the depository institution of the purpose and identity of the accounts. Funds held in trust include funds held in any fiduciary capacity in connection with a representation, whether as trustee, agent, guardian, executor or otherwise. Attorney trust accounts shall be maintained only in financial institutions approved by the Commission.

59. *Colman*, 885 N.E.2d at 1243.

60. *Id.* IND. PROF. CONDUCT R. 1.8(a) provides:

A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

- (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;
- (2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and
- (3) the client gives informed consent, in writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

61. *Colman*, 885 N.E.2d at 1243. IND. PROF. CONDUCT R. 1.5(a) provides: "A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses."

ascertained that the facts proved constituted violations of the Rules, the supreme court turned its attention to determining the appropriate sanction to impose on this lawyer. The list of factors the court relied on in fashioning a sanction in this case is one of the reasons that this case is an important component of this year's survey Article.

The court began its discussion of appropriate sanction noting,

[r]espondent's individual ethical violations are troublesome, but in the aggregate they raise the larger concern that [r]espondent fails to understand and honor the fundamental principles of the attorney-client relationship. Rather than seeing the relationship as one of undivided loyalty to the client, [r]espondent appears to view that relationship as a chance for personal financial gain wholly apart from compensation for legal services rendered whenever the opportunity arises.⁶²

The easiest way to appreciate the considerations that were important to the court is to view them in list fashion. Thus, the aggravating factors found by the hearing officer included: (1) the respondent "demonstrated a pattern of misconduct"; (2) the respondent's "conduct was in part based on selfish [or] dishonest motives"; (3) the respondent "engaged in multiple violations"; (4) the respondent "was dealing with a vulnerable client in the case of G.A."; (5) the respondent "refused to acknowledge any wrongdoing"; (6) the respondent had a prior private reprimand from 1978 for communicating directly with a represented party; (7) the respondent had a prior private reprimand in 1995 for lending a client \$3000 and failing to advise her to seek independent legal advice; (8) the respondent had been previously suspended for eighteen months in 1996 for a federal criminal conviction for filing a false tax return; and (9) although the hearing officer found the respondent's skill to be a mitigating factor, the court noted that M.M.'s testimony about the condominium seemed a confession to fraud and perjury in the federal forfeiture action (clearly not really mitigating factors).⁶³

Finally, although not technically designated as an aggravating factor, the court also noted that "even if G.A. was competent to execute a will, his frailty and vulnerability were demonstrated by [r]espondent's filing of a guardianship proceeding, as G.A.'s attorney just days after will's execution."⁶⁴

This case illustrates the potential problem articulated in comment 1 to Indiana Professional Conduct Rule 1.8: "A lawyer's legal skill and training, together with the relationship of trust and confidence between lawyer and client, create the possibility of overreaching when the lawyer participates in a business, property or financial transaction with a client."⁶⁵

The supreme court then ordered the respondent suspended from the bar for

62. *Colman*, 885 N.E.2d at 1243.

63. *Id.* at 1242.

64. *Id.* at 1244.

65. IND. PROF. CONDUCT R. 1.8 cmt. 1.

at least three years, after which he may be readmitted to the bar only if he proves by clear and convincing evidence, among other things, genuine remorse for his misconduct, a proper understanding of the ethical standards imposed on members of the bar, and his willingness to conduct himself in conformity with such standards.⁶⁶

The imposition of the three-year suspension was derived by the 3-2 majority of the supreme court.⁶⁷ The Chief Justice and Justice Brent Dickson clearly agreed with the finding that the respondent had committed misconduct, but they dissented as to the sanction imposed.⁶⁸ Both issued opinions explaining why they independently came to the conclusion that this lawyer should be permanently disbarred.⁶⁹ These opinions are another factor meriting coverage of *Colman* in this Article. They give a glimpse into the personal thought processes of the authoring justices that is not normally seen in disciplinary cases.

It was not lost on Chief Justice Shepard that this was Colman's fourth disciplinary action⁷⁰ and that three had occurred while the chief justice was a member of the court.⁷¹ He noted that he had spent "considerable time going behind the briefs" in an eventually fruitless effort to find some support for the respondent's stern defense that he had done absolutely nothing wrong.⁷² Specifically the chief justice noted:

It was not to be so. Respondent's testimony before the [h]earing [o]fficer, the affidavits he made for the purposes of this proceeding, and the letters from him and others revealed an insistence that he acted in accord with the letter and spirit of the rules. . . . Having had several years to reflect on how he handled the will and guardianship of a man in his mid-nineties whom [r]espondent knew to be infirm, [r]espondent reasserted on the stand that he saw no possibility that this dual role might limit his representation or present any conflict. "Not that I could see or can see." "No, absolutely none." This posture of total denial is similarly reflected in [r]espondent's contention that his elderly client's will was not really handled by Respondent but was rather under the care of attorney Watts, who never met, or spoke, or corresponded with the

66. *Colman*, 885 N.E.2d at 1244 (citing IND. ADMIS. DISC. R. 23, § 4(b)). This last passage is a quote from Admission and Discipline Rule 23, section 4(b) regarding factors a suspended lawyer must prove to demonstrate his fitness to return to practice.

67. *Id.*

68. *See id.* at 1245 (Shepard, C.J., dissenting); *id.* at 1246 (Dickson, J., dissenting).

69. *Id.* at 1245 (Shepard, C.J., dissenting); *id.* at 1246 (Dickson, J., dissenting). Under Admission and Discipline Rule 23(3)(a) disbarment in Indiana is referred to as permanent disbarment because the lawyer is not permitted to petition for reinstatement of his or her license. IND. ADMIS. DISC. R. 23(3)(a).

70. *Colman*, 885 N.E.2d at 1245 (Shepard, C.J., dissenting).

71. *Id.*

72. *Id.*

testator.⁷³

This highlights one of the *leitmotif* of the case: the respondent had an established pattern of recognizing a client's vulnerability and then exploiting it mercilessly for self-gain. In the chief justice's opinion, the straw that broke the proverbial camel's back was the respondent's own testimony as to how the reasonableness of his fee might be characterized. His response was, "[a]nything anybody will pay."⁷⁴ In the chief justice's analysis, that made any current or future redemption for the respondent impossible thereby militating only one possible sanction—permanent disbarment.⁷⁵

Associate Justice Brent Dickson reached the same conclusion albeit along a different path:

When the respondent was convicted of a federal felony in 1996, this Court unanimously voted not to disbar but only suspend his privilege to practice law for a substantial time. And we later unanimously agreed to reinstate him. . . . On reflection, I should have, but did not, dissent to these [*per curiam*] decisions. I choose, however, not to make the same mistake a third time, and agree with Chief Justice Shepard that the respondent should be disbarred for his misconduct.⁷⁶

Although the actual sanction for the respondent lawyer was, by consensus, a suspension allowing his to petition for reinstatement after three years, the burden on the respondent to show his fitness to re-enter the practice of law will be heavy indeed.⁷⁷

B. What Is a Disciplinary "Proceeding": Geoffrey N. Fieger's Case

The Indiana Supreme Court was called to decide the case of Michigan attorney Geoffrey N. Fieger who was admitted in Indiana on a temporary basis.⁷⁸ Fieger was charged by the Disciplinary Commission with two counts of misconduct in the course of representing a party in an Indiana civil case.⁷⁹

1. *Background*.—In 2001, the Michigan Attorney Grievance Commission⁸⁰

73. *Id.* Unsurprisingly, the *quality* of the evidence (i.e. "made for purposes of this proceeding") was an important factor for the chief justice in his search for some redeeming factor in the respondent's favor. *Id.*

74. *Id.*

75. *Id.*

76. *Id.* at 1246 (Dickson, J., dissenting).

77. *Id.* at 1244 (majority opinion).

78. *In re Fieger*, 887 N.E.2d 87, 88-89 (Ind. 2008). In its opinion, the court noted that it had jurisdiction to discipline the respondent lawyer by virtue of his temporary admission and the court's constitutional grant under. *Id.* at 88 (citing IND. CONST. art. 7, § 4).

79. *Id.* at 88-90.

80. Essentially, an agency with a function parallel to Indiana's Supreme Court Disciplinary Commission. See Attorney Grievance Commission, State of Michigan, <http://www.agcmi.com/> (last visited June 29, 2009).

filed a formal disciplinary petition against the respondent alleging that while he was on his radio program, he made disparaging and threatening remarks aimed at three judges of the Michigan Court of Appeals who had ruled against him in a case.⁸¹ A Michigan hearing panel recommended that he receive a reprimand for his conduct, but allowed him the right to appeal the decision.⁸² The reprimand was eventually vacated and Fieger's case dismissed, but the grievance administrators took an appeal to the Michigan Supreme Court and that court agreed to review the decision.⁸³ The respondent attempted to remove the case to the federal district court and, eventually to the U.S. Court of Appeals for the Sixth Circuit.⁸⁴ By late 2005, the respondent's appeal was pending and the grievance administrator's case was pending before the Michigan Supreme Court.⁸⁵

In December 2005, the respondent applied for temporary admission to represent a party in the St. Joseph Superior Court in South Bend, Indiana. In his application, the respondent asserted under oath that no "formal disciplinary proceedings" were pending against him.⁸⁶ In January 2006, the Indiana trial court granted the application.⁸⁷ About six months later, the Michigan Supreme Court reversed the lower court's decision and ordered that the respondent be reprimanded for his misconduct.⁸⁸ The respondent notified the Indiana trial court of this development in August 2006.⁸⁹

In the Indiana disciplinary action, the respondent's admission in Arizona was the subject of the court's attention.⁹⁰ The Arizona State Bar Association filed a complaint against the respondent, and he was served with an Arizona "Probable Cause Order."⁹¹ That was the status of the Arizona case when the respondent executed his application for temporary admission in December 2005.⁹² On December 30, 2005, the Arizona bar filed their complaint against the respondent alleging several ethical violations, and on January 6, 2006, the respondent filed his application for temporary admission with the Indiana Supreme Court.⁹³ Three days later, the Arizona complaint was served on the respondent's Arizona attorney and the respondent was notified no later than January 20, 2006 about the

81. *Fieger*, 887 N.E.2d at 88.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.* "He intentionally altered the language of Admission and Discipline Rule 3(2)(a)(4)(V) to add the word 'formal.'" *Id.*

87. *Id.* at 88-89.

88. *Id.* at 89.

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

complaint.⁹⁴ “After the Indiana trial court approved the [r]espondent’s temporary admission, the opposing party [moved] to reconsider [that action] on January 23, 2006.”⁹⁵ Although temporary admission was withdrawn, the respondent sought reconsideration of that order and, after a hearing, the decision was reconsidered and temporary admission was again restored on June 12, 2006.⁹⁶ Although he argued to the Indiana trial court that at the hearing on the motion to reconsider he had “no pending charges,” he never told the court about the case pending in Arizona.⁹⁷ By October 2006, Indiana’s Disciplinary Commission had notified the respondent of its investigation of his activities.⁹⁸ Thereafter, in November 2006, the respondent notified the trial court for the first time that a matter was pending against him in Arizona.⁹⁹

2. *The Indiana Disciplinary Action.*—At the hearing in the Indiana disciplinary action the hearing officer adopted an “extraordinarily narrow” definition of the supreme court’s “Disclosure Rule.”¹⁰⁰ The respondent argued that his application for temporary admission in Indiana was accurate at the time it was executed, the Michigan disciplinary “proceeding” had been dismissed, and the appeal of that dismissal was not a “proceeding” as defined under Michigan law.¹⁰¹ Respondent made this argument even though the chapter in which the applicable Michigan law was located was entitled, “Professional Disciplinary Proceedings.”¹⁰² The respondent testified that he intentionally added the word “formal” to the language related to Indiana’s Disclosure Rule¹⁰³ to protect himself from a charge of dishonesty in case there was some “complaint floating out there that I don’t even know about or that I don’t recall.”¹⁰⁴ The court made short work of that argument:

Adding the word “formal” would not seem to help if this were really his

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.* at 90. The rule in question is part of Indiana Admission and Discipline Rule 3(2)(a)(4)(v) governing temporary admission. The rule includes the language stating,

“That **no disciplinary proceeding is presently pending** against the attorney in any jurisdiction; or, if any proceeding is pending, the petition shall specify the jurisdiction, the charges and the address of the disciplinary authority investigating the charges. An attorney admitted under this rule **shall have a continuing obligation** during the period of such admission promptly to advise the court of a disposition made of pending charges or the institution of new disciplinary proceedings.”

Fieger, 887 N.E.2d at 90 (quoting IND. ADMIS. DISC. R. 3(2)(a)(4)(v)).

101. *Fieger*, 887 N.E.2d at 90.

102. *Id.*

103. For the language of the Disclosure Rule, see *supra* note 100.

104. *Id.*

concern; it would make more sense to say no “known” disciplinary proceedings were pending. In any case, the change in wording shows [r]espondent gave careful consideration to the scope of his duty to disclose and chose not to mention the Michigan action.¹⁰⁵

The court went on to point out that the relevant consideration was not the scope of the term “proceeding” under Michigan law, but rather the scope under *Indiana’s* Disclosure Rule.¹⁰⁶ In short, this state’s view of the term is quite broad in scope and the respondent should have completely disclosed his troubles in Michigan rather than conceal them through his legalistic interpretation of the rules.¹⁰⁷ For all his trouble, the respondent was barred from applying for temporary admission to the bar in Indiana for two years.¹⁰⁸ Associate Justice Brent Dickson dissented from the court’s main opinion and would have permanently barred the respondent from obtaining temporary admission in Indiana.¹⁰⁹ Associate Justice Frank Sullivan would have adopted the analysis and conclusions of the hearing officer.¹¹⁰

One noteworthy part of this opinion is that it required the court to delve into an area that it rarely needs to address—problems with non-Indiana attorneys practicing in our courts. In *Fieger*, the court makes reference to *In re Fletcher*¹¹¹—a case with similar facts to *Fieger*.¹¹² In the cited *Fletcher* opinion, the court was called upon to address a challenge by a lawyer admitted in Illinois who had been alleged to have committed misconduct while temporarily admitted in Indiana.¹¹³ The court gave an extensive analysis of not only why the respondent was subject to the jurisdiction of the Indiana Supreme Court, but how he had voluntarily submitted to it when he undertook the temporary admission.¹¹⁴ That case was remanded back to the disciplinary hearing officer for a final adjudication which, in the end, resulted in a separate opinion giving *Fletcher* a two year ban on admission in Indiana.¹¹⁵

105. *Id.* (footnote omitted).

106. *Id.* at 90-91.

107. *Id.* at 91.

108. *Id.* at 92.

109. *Id.*

110. *Id.* That would have been a finding in the respondent’s favor. *See id.* at 90.

111. 655 N.E.2d 58 (Ind. 1995).

112. *Fieger*, 887 N.E.2d at 90, 92.

113. *Fletcher*, 655 N.E.2d at 59.

114. *Id.* at 59-61.

115. *In re Fletcher*, 694 N.E.2d 1143, 1143 (Ind. 1998).

II. MALPRACTICE AND PROFESSIONAL LIABILITY ISSUES

A. “*For Fear of Walking on The Mines I’d Laid*”:¹¹⁶ *Carlson v. Sweeney, Dabagia, Donoghue, Thorne, Janes & Pagos*¹¹⁷

This case involved protracted litigation over the terms of the 1988 wills of a husband and wife and related trust and tax issues.¹¹⁸ However, there were other noteworthy issues along the way for the patient reader. Although this Article is not intended to serve as a survey of procedural issues, the supreme court noted that “[t]his case is before us in a rather unusual procedural posture.”¹¹⁹ A trial court order from litigation in 1994 preceded, and was an indispensable component in, the filing of the malpractice case in 1999.¹²⁰ By the time the supreme court was presented with the litigation in 2008, the time for challenging any feature of that order had long since passed.¹²¹ Still, because of the potential involvement of the federal courts and the interpretation of Indiana law by the Internal Revenue Service, the supreme court’s comment on the ruling was vital to both parties.¹²²

As briefly as practicable, the facts are as follows: In 1988, Norman Carlson, Sr. and his wife Hilda hired Sweeney, Dabagia, Donoghue, Thorne, Janes & Pagos (the law firm) to prepare their wills and a trust a manner that when their son and his wife (Norman Jr. and Margaret) died, their property would pass down in a way that their grandchildren would receive the property and not be subject to federal estate or state inheritance tax.¹²³ Norman Sr. and Hilda both died in 1992 and their wills were admitted to probate.¹²⁴ In 1994, Norman Jr.’s Texas attorney noted a problem with the language in the trust documents that would potentially cause significant tax consequences for their children upon their deaths.¹²⁵ Norman Jr. and his wife asked the law firm to file a petition to reform the trust language to give effect to the wishes of Norman Sr. and Hilda.¹²⁶ In August 1994, the trial court entered an order that the court, the Carlsons, and the law firm believed would be adequate to reform the trust and achieve the tax reduction goals originally set out in 1988.¹²⁷ The supreme court quoted

116. STING, *Fortress Around Your Heart*, on THE DREAM OF THE BLUE TURTLES (A&M Records 1985).

117. 895 N.E.2d 1191 (Ind. 2008).

118. *Id.* at 1193.

119. *Id.* at 1201.

120. *Id.* at 1194-95.

121. *Id.* at 1198-99.

122. *Id.* at 1198-1201.

123. *Id.* at 1193.

124. *Id.*

125. *Id.* at 1194.

126. *Id.*

127. *Id.* at 1194-95.

extensively from this order in its 2008 opinion.¹²⁸

The trial court's order reforming the trust did not, however, resolve the dispute between the Carlsons and the law firm. In June 1999, the Carlsons filed a formal complaint for legal malpractice against the law firm based on the language used to draft Norman Sr.'s and Hilda's wills and trust.¹²⁹ The law firm counterclaimed against the Carlsons for unpaid fees.¹³⁰ The firm also filed a motion for summary judgment that the trial court granted in part, effectively disposing of the litigation by holding that because of the reformation, the misconduct complained of in the malpractice suit had been resolved.¹³¹ The beneficiaries of the trust appealed the trial court's order.¹³² Among its arguments, the law firm claimed that trying to predict the future tax liability from the substantive issues in the litigation was speculative and, therefore, the Carlson's suit was premature.¹³³ In an extensive discussion of the law of statutes of limitations, the court of appeals explained that the Carlsons were not too early filing suit; they were, in fact, too late.¹³⁴ Indiana (like many states) has a two year statute of limitations for bringing malpractice claims by prospective plaintiffs and, here, the Carlsons should have filed after their Texas lawyer told them that the law firm had created this problem.¹³⁵ In the view of the court of appeals, however, the law firm had waived the affirmative defense of the statute of limitations by not raising it previously.¹³⁶

After that opinion was issued in June 2007, a petition for rehearing was filed specifically as it related to the statute of limitations issue.¹³⁷ On August 8, 2007, the court of appeals issued a corrected opinion.¹³⁸ The court noted,

[u]nbeknownst to this court, the parties had entered into pre-suit agreements tolling the statute of limitations. Therefore, the Carlsons did not file their claim in violation of the statute of limitations, and the Lawyers did not waive the defense by failing to plead it. In sum, neither party's attorney erred regarding the statute of limitations. As the parties concede in their petition, the fact that pre-suit agreements existed has no

128. *Id.*

129. *Id.* at 1195.

130. *Id.*

131. *Id.* This is something of a simplification of the specific rulings of the court, but the issues that are especially noteworthy for the purposes of this work do not hinge on a detailed understanding of the will and trust issues.

132. *Carlson v. Sweeney, Dabagia, Donoghue Thorne, Janes & Pagos (Carlson I)*, 868 N.E.2d 4 (Ind. Ct. App. 2007), *reh'g granted and modified, Carlson II*, 872 N.E.2d 626 (Ind. Ct. App. 2007), *aff'd in part, Carlson III*, 895 N.E.2d 1191 (Ind. 2008).

133. *Id.* at 20.

134. *Id.* at 20-22.

135. *Id.* at 20-21.

136. *Id.* at 21.

137. *Carlson II*, 872 N.E.2d at 626.

138. *Id.*

effect on the outcome or rationale of our previous decision and we grant the petition for rehearing for the sole reason of removing any suggestion that the parties' attorneys acted negligently with regard to the statute of limitations.¹³⁹

This seems like not only an appropriate, but laudable, application of a pre-suit agreement. The decision when to file a malpractice action is, of course, a matter between the plaintiff and his or her lawyer.¹⁴⁰ A careful reading of these opinions, however, leaves the reader with the clear view that these were sophisticated parties dealing with complex issues. A rush to the courthouse may not have served any of the parties or courts involved because of the court's need to diligently process claims.¹⁴¹ Any specific measurement of harm from the law firm's conduct was very possibly speculative because a number of events had to occur between the execution of the wills and trust and the ultimate determination of the taxes imposed. A possible pre-suit settlement would have been, by definition, the product of extensive negotiation. Use of such a pre-suit agreement could certainly be broad enough to include issues like pre-suit discovery, e.g., depositions. As beneficial the lawyers' use of this agreement seemed to be to the parties in this extensive litigation, a plain reading of the supreme court's opinion reveals the potential problems with protracting litigation through the use of these agreements.

Once the supreme court turned its attention to the issue of reformation under Indiana law, the court noted that the terms of the trial court's 1994 judgment were not properly before the court for decision.¹⁴² The order was now a binding decree and not subject to any sort of collateral attack.¹⁴³ However, the reformation issue was the big foundational issue for the entire litigation.¹⁴⁴ Said another way, if the court had found a way to determine that the 1994 order was an ineffective attempt at reformation, the position of the parties could have been vastly different. Fortunately for them, that was not the case. Ultimately, the court held that the terms of the 1994 order reforming the standard established in the trust was adequate, under Indiana law, to constitute an effective reformation of the Carlson trust sufficient to accomplish the goals originally set by the settlors, Norman Sr. and Hilda.¹⁴⁵

139. *Id.* at 627.

140. The use of the grammatical plural here is deliberate since there were at least two married couples involved as potential plaintiffs in any possible malpractice claim against the law firm.

141. *See, e.g.*, IND. PROF. CONDUCT R. 1.3 (regarding diligently pursuing client matters); IND. CODE OF JUD. CONDUCT R. 2.5(A) (requiring judges to perform both judicial and administrative duties diligently and promptly).

142. *Carlson v. Sweeney, Dabagia, Donoghue, Thorne, Janes & Pagos (Carlson III)*, 895 N.E.2d 1191, 1198 (Ind. 2008).

143. *Id.*

144. *See id.* at 1198-1201.

145. *Id.* at 1200-01. This conclusion was certainly important to the parties but the ultimate decider is the Internal Revenue Service. *See id.* at 1196. Specifically, the court explained the

The court did, however, undo part of the trial court's summary judgment order from 1999.¹⁴⁶ As noted earlier, the summary judgment order effectively held that the terms of the 1994 order reformed the trust language sufficiently to overcome the concerns about the tax issues.¹⁴⁷ The court held:

There are at least two problems with the trial court's position. First, as the Beneficiaries point out and the Court of Appeals observed, "[T]he Carlsons have already expended time and money dealing with the Wills; if the Lawyers' work with regard to the Wills is determined to be negligent, these costs may be considered damages flowing from the Wills regardless of whether the IRS assesses a tax penalty. We agree. Summary judgment in favor of [l]aw [f]irm on this point was error. Second, as for the IRS, it is clear that the agency as well as the federal courts are bound by this Court's determination that the Testators' wills were properly reformed in accordance with the laws of this State. . . . What is less clear, however, is what reaction the federal authorities will have to all of this. More precisely is there some reason the I.R.S. may find to avoid the effect of the reformation in spite of this Court's opinion? We have no way to know one way or the other and decline to speculate. Because there is a dispute of material fact on this issue, summary judgment in favor of Law Firm was inappropriate on this point as well.¹⁴⁸

The case was remanded to the trial court presumably for a resolution of the issues through trial or settlement since the court had held a genuine issue of material fact existed between the parties thereby taking it out of summary judgment.¹⁴⁹ Hence the heading at the beginning of this section—"walking on the mines I'd laid." In this instance, the law firm finally got a decision on the language it had drafted in a couple of wills and a trust twenty years ago. That decision, however, keeps the dispute going into its third decade with the law firm still not off the hook for the tax consequences of its work. It is possible that future decisions in the case will be the subject of future survey articles on professional responsibility.

importance of its determination should the tax issue end up working its way through the federal courts. *Id.* There is U.S. Supreme Court authority, not discussed here, that explains the importance of a state's highest court's decisions regarding its own law and how that determination impacts tax questions before the IRS. *See id.* The Indiana Supreme Court was also well aware that the parties could seek a Private Letter Ruling (PLR) from the IRS to advance their cause as well. *Id.* at 1201 n.11.

146. *Id.* at 1201.

147. *Id.* at 1195-96.

148. *Id.* at 1201 (citations and footnote omitted).

149. *Id.*; *see* IND. TRIAL R. 56 (providing the summary judgment standard).

*B. Trampoline Litigation: Querrey & Harrow, Ltd. v. Transcontinental Insurance Co.*¹⁵⁰

In the underlying litigation, a young man was injured while playing on a Jumpking brand trampoline.¹⁵¹ The parties ended up settling the litigation for \$6,300,000.¹⁵² CNA Insurance had provided excess insurance coverage and had to pay \$3,740,000 as part of the settlement.¹⁵³ After the settlement concluded, CNA filed suit against the defense lawyers for failing to raise a non-party defense to the personal injury claim.¹⁵⁴ The trial court refused to grant the defendant law firm summary judgment on the issue and they appealed.¹⁵⁵ The court of appeals held that CNA could not sue the law firms because the assignment of legal malpractice claims is not allowed in Indiana, and the doctrine of equitable subrogation is also not recognized.¹⁵⁶ The court also held that the law firm did not represent CNA either; thus, no attorney-client relationship existed between the defendant law firm and the insurer.¹⁵⁷ As a result, no malpractice relief was available for the insurance company.¹⁵⁸

The insurer sought transfer to the supreme court.¹⁵⁹ In a brief opinion, the court adopted the court of appeals's opinion and noted that the rejection of equitable subrogation was an issue of first impression in Indiana.¹⁶⁰ In all other respects the court adopted the opinion of the court of appeals.¹⁶¹ The opinion, however, was not unanimous. Associate Justice Frank Sullivan authored a dissenting opinion making the case for equitable subrogation.¹⁶² In his dissent, Justice Sullivan makes the point that the lawyers and law firms should not enjoy a windfall merely because the insured contracted for excess coverage.¹⁶³ Justice Sullivan also notes that even if these kinds of suits were allowed, the carrier would not face an easy road to recovery since they would not have the benefit of the confidential information passed between the lawyer and the client in the

150. 885 N.E.2d 1235 (Ind. 2008).

151. *Querrey & Harrow, Ltd. v. Transcon. Ins. Co. (Querrey & Harrow I)*, 861 N.E.2d 719, 720 (Ind. Ct. App. 2007), *adopted on transfer*, 885 N.E.2d 1235 (Ind. 2008).

152. *Id.*

153. *Id.*

154. *Id.* at 720-21. IND. CODE § 34-51-2-14 (2008) provides, "In an action based on fault, a defendant may assert as a defense that the damages of the claimant were caused in full or in part by a nonparty."

155. *Querrey & Harrow I*, 861 N.E.2d 719, 721.

156. *Id.* at 722-24.

157. *Id.* at 724-25.

158. *Id.*

159. *Querrey & Harrow, Ltd. v. Transcon. Ins. Co. (Querrey & Harrow II)*, 885 N.E.2d 1235 (Ind. 2008).

160. *Id.* at 1236-37.

161. *Id.* at 1236.

162. *Id.* at 1237 (Sullivan, J., dissenting).

163. *Id.* at 1237-38.

underlying case.¹⁶⁴ Although the court of appeals and the supreme court's majority opinion make the law clear, Justice Sullivan's dissent does an excellent job of outlining the major factors to be considered in future cases if carriers were to seek to recover for the shortcomings of defense counsel.

III. PROSECUTORIAL AND DEFENSE CONFIDENTIALITY: *BASSETT V. STATE*¹⁶⁵

Bassett was convicted of four murders in 1998 and sentenced to four consecutive life terms without the possibility of parole.¹⁶⁶ In an earlier appeal, the convictions were reversed and Bassett was tried for a second time in 2005.¹⁶⁷ From 2003 until his second trial, Bassett was housed in the Bartholomew County Jail in Columbus.¹⁶⁸ During that time, his lawyer visited him eleven times and they spoke by phone on numerous occasions.¹⁶⁹ The chief deputy prosecutor for Bassett's case learned from a witness that Bassett was trying to hire an assassin from the jail and one of his intended victims was the deputy prosecutor herself.¹⁷⁰ The chief deputy told the elected prosecuting attorney who then undertook an investigation into the allegation.¹⁷¹ Among the steps in his investigation was the prosecutor's review of the telephone calls between the defendant, Bassett, and his lawyer on jail telephones.¹⁷² After reviewing several conversations, there was no evidence that Bassett was using the phone calls with his lawyer for anything like trying to hire a hit man, and the prosecutor stopped reviewing the calls.¹⁷³ He likewise did not tell Bassett's lawyer that he had reviewed the recordings.¹⁷⁴ Defendant and his attorney were not aware that the prosecutor had listened to any of the conversations.¹⁷⁵ It is important to note, however, that the telephone system actually told the parties that all calls were being recorded.¹⁷⁶

At a sidebar conference during trial, the prosecutor revealed that he had heard the conversations, and Bassett's counsel moved for a mistrial.¹⁷⁷ The court denied the motion.¹⁷⁸ Bassett's claim of prosecutorial misconduct was reviewed by the supreme court beginning with a review of the Indiana Rules of

164. *Id.* at 1238.

165. 895 N.E.2d 1201 (Ind. 2008), *cert. denied*, 129 S. Ct. 1920 (2009).

166. *Id.* at 1204.

167. *Id.*

168. *Id.* at 1205.

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.* at 1207. Specifically, "This is Cincinnati Bell with a collect call from the Bartholomew County Jail from _____. This call may be recorded." *Id.*

177. *Id.* at 1205.

178. *Id.*

Professional Conduct, Rule 3.8 governing the conduct of prosecutors.¹⁷⁹ Specifically, comment 1 of that rule provides, “A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice.”¹⁸⁰ The court expressed concern over the notion that a prosecutor would review recorded phone conversations “willy-nilly,” but concluded,

we recognize that the prosecutor’s motivation in listening to the recordings was the investigation of possible criminal activity—and not just any criminal activity but the threat of harm to his own chief deputy. This is not a disciplinary proceeding and, therefore, it is not necessary for us to decide whether the prosecutor committed misconduct unless the prosecutor’s conduct caused Bassett undue prejudice. Said more precisely, a defendant is entitled to relief only “if the misconduct, under all the circumstances, placed the defendant in a position of grave peril to which he or she would not have been subjected.”¹⁸¹

After extensive discussion of the history of these inquiries and the nature of the “peril,” the court concluded that the prosecutor had not committed misconduct and, indeed, had done nothing wrong.¹⁸² Part and parcel of the supreme court’s analysis was the trial court’s careful control over the use of the information received from the phone calls including a severe limitation on the information provided and prohibition of the use of an individual’s name during a testimony so as to limit the impact of the information received from the telephone calls.¹⁸³ In the end, Bassett’s conviction was upheld and no misconduct was held to have been committed by the prosecuting attorney.¹⁸⁴

179. *Id.* at 1208; *see also* IND. PROF. CONDUCT R. 3.8.

180. IND. PROF. CONDUCT R. 3.8 cmt. 1.

181. *Bassett*, 895 N.E.2d at 1208 (quoting *Cooper v. State*, 854 N.E.2d 831, 835 (Ind. 2006)).

182. *Id.* at 1209-10.

183. *Id.* at 1210.

184. *Id.* at 1215.

RECENT DEVELOPMENTS IN INDIANA REAL PROPERTY LAW

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I. CONVEYANCES

A. *Foreclosure Property—Marketable Title*

With the unstable state of the real estate market and the global economy, an inordinate number of residential and commercial properties are being acquired via foreclosure.¹ A case before the Indiana Court of Appeals in spring 2008 illustrates some of the problems that arise in purchasing distressed real estate and provides practitioners a review of Indiana's rules for conveying marketable title in real property.

The case, *House v. First American Title Co.*,² concerned property purchased from a residential real estate developer that had foreclosed its mortgage on a home.³ House purchased the home from The Centex Home Equity Co., LLC.⁴ In connection with the purchase, House hired Security Title Services, LLC, to perform a title search.⁵ After Security Title issued a commitment without liens on the property, House purchased title insurance from First American Title Company and closed on the sale.⁶

House improved the property and put it on the market.⁷ A sale fell through after the potential buyer's title search revealed two liens on the property: one held by Provident Bank against the original homeowners, Richard and Ginny Wykoff, and the second held by American Acceptance against Ginny.⁸

When Centex, Security Title and First American refused to clear House's title to the property, he sued them,⁹ and the trial court granted the defendants-appellees' motion to dismiss.¹⁰

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1. See Gretchen Morgenson, *So Many Foreclosures, So Little Logic*, N.Y. TIMES, July 4, 2009, at B1.

2. 883 N.E.2d 197 (Ind. Ct. App. 2008).

3. *Id.* at 199.

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.* at 200.

After another potential buyer's title search revealed two additional liens on the property, House filed a quiet title action at his expense.¹¹ After Judge James D. Humphrey held that the judgment liens were still valid against the property, House amended his complaint, alleging each title insurance company breached its contractual duty owed to him.¹² He further alleged that First American's failure to defend his title to the property constituted unfair claim practices, therefore making First American liable for treble damages.¹³ The parties' motions to dismiss House's claims were again granted, and House appealed.¹⁴

House claimed that he was damaged because he lost two sales and incurred the cost of a quiet title action.¹⁵ Centex argued that the special warranty deed it gave House predecided House's claim for damages. The special warranty deed contained a single covenant of warranty,¹⁶ which the court recognized as "a future covenant which is not breached until the grantee is evicted from the property, buys up the paramount claim or is otherwise damaged."¹⁷ The court concluded that this single covenant does not require a grantor to reimburse a grantee for the cost of a quiet title action, nor is the grantor liable to the grantee for lost sales.¹⁸ The court upheld the trial court's decision to grant Centex's motion to dismiss, stating that the covenant did not mean that the title to the property was marketable or guaranteed as such, rather, it acted as a covenant to indemnify the grantee against lawful claims.¹⁹ Allowing House to seek damages for lost sales would re-write the deed to add additional covenants that did not exist in the deed.²⁰

Security Title argued that disclosure of the three liens was not required because they were legally deficient.²¹ The court noted that Security Title did not offer any authority in support of this argument nor were there any facts before the court indicating whether the property was held by the entirety, thereby addressing whether or not the judgments against the individual Wykoffs would attach to the property.²² As a result, Security Title's motion to dismiss was

11. Aurora Elementary School had a lien against Richard Wykoff and the Dearborn County Hospital had a lien against the Wykoffs. *Id.*

12. *Id.* at 199-200.

13. *Id.*

14. *Id.*

15. *Id.* at 201.

16. "The Grantor [Centex], herein and its successors shall warrant and defend the title to the above described real estate to Grantee [House], [his] successors and assigns, against the lawful claims and demands of all persons claiming by, through or under Grantor but against none other." *Id.* at 200-01.

17. *Id.* (quoting *Outcalt v. Wardlaw*, 750 N.E.2d 859, 863 (Ind. Ct. App. 2001)).

18. *Id.* at 201.

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.* (citing IND. CODE § 32-17-3-1 (2008)).

reversed.²³

First American's motion to dismiss relied on exclusions in the title insurance policy, including one that states that it had no liability for, "defects, liens, encumbrances, adverse claims or other matters . . . resulting in no loss or damage to the insured claimant."²⁴ First American further argued that it was not required to pay damages to House unless a lien was enforced against him.²⁵ The court found that First American ignored the fact that House needed to expend funds to clear his title and concluded that if House's allegations were taken as true, they established the fact that he had unmarketable title.²⁶ Citing *Humphries v. Ables*,²⁷ the court noted that marketable title is unlikely to trigger litigation involving issues related to a clouded title.²⁸ Further, the court noted that "marketable title is title a prudent person would accept and has no defects affecting the possessory title of the owner."²⁹ The court stated that insurance against unmarketable title would be illusory if an insured had to wait for liens to be enforced or lapse because the insured would be unable to sell the property during that time.³⁰ The court reasoned that because two potential buyers were unwilling to close on the property, House had to commence a quiet title action in order to sell it and obtain a return on his investment.³¹ Thus, without the quiet title action to establish clear title, House did not have marketable title.³²

House amended his original complaint to delete the allegation of unfair claim settlement practices contrary to Indiana Code section 27-4-1-4.5 and instead alleged that First American's unfair claim practices were, according to *Erie Insurance Co. v. Hickman*,³³ a civil tort.³⁴ In *Hickman*, the Indiana Supreme Court recognized that "there is a legal duty implied in all insurance contracts that the insurer must deal in good faith with its insured."³⁵ The court noted that House's complaint alleged four judgment liens on the property, thereby providing sufficient notice that the denial of his claim was tortious for the reasons

23. *Id.*

24. *Id.* at 202.

25. *Id.*

26. *Id.* at 202-03.

27. 789 N.E.2d 1025, 1033-34 (Ind. Ct. App. 2003).

28. *Id.*

29. *Id.* (citing *Russell v. Waltz*, 458 N.E.2d 1172, 1178 (Ind. Ct. App. 1984)).

30. *Id.* at 202-03.

31. *Id.* at 202.

32. *Id.* at 202-03.

33. 622 N.E.2d 515 (Ind. 1993).

34. *See generally id.*

35. *House*, 883 N.E.2d at 203 (quoting *Hickman*, 622 N.E.2d at 518 (quotation marks omitted)). The duty "includes that obligation to refrain from (1) making an unfounded refusal to pay policy proceeds; (2) causing an unfounded delay in making payments; (3) deceiving the insured; and (4) exercising any unfair advantage to pressure an insured into settlement of his claim." *Id.* at 203-04.

enumerated in his complaint.³⁶ As a result, the court determined that his allegations were sufficient to survive a motion to dismiss.³⁷

B. Granting Deed and Adverse Possession

*Hoose v. Doody*³⁸ provides an interesting look at conveyance documents affecting lake property and claims of ownership based on adverse possession. Michael and Darlene Hoose purchased lot eight in the Osborne Subdivision in Kosciusko County.³⁹ The subdivision borders Big Chapman Lake.⁴⁰ The granting deed specifically described lot eight and also conveyed to the Hooses,

the proprietorship of land directly between said lot and lake and [grantees] agrees [sic] that no buildings or occupancy will be allowed thereon, subject to the Laws of the State of Indiana governing bodies of water. If said strip of land is ever vacated, owners of lot no. Eight (8) shall have priority of purchase.⁴¹

Neighbors owning lot nine, adjacent to the Hooses' lot eight, constructed a pier and that led to a dispute as to whether the area immediately north of lot eight (the Disputed Area) was a dedicated park.⁴² The recorded subdivision plat contained a faint, "barely visible" numeral seven in the Disputed Area.⁴³ On July 10, 1953, the owners of the Osborne subdivision recorded and amended the plat.⁴⁴ This amended plat identifies the area north of lot eight as a dedicated park, but because not every owner in the Osborn subdivision signed the amended plat, it was vacated in 1953.⁴⁵

The Hooses filed a complaint for declaratory injunctive relief against the Doodys alleging that the warranty deed they received for lot eight conveyed exclusive use of the Disputed Area to them, requiring the Doodys to remove all improvements placed on the area.⁴⁶ The Hooses also asked for a permanent injunction prohibiting the Doodys from creating or maintaining any form of encroachment upon the Disputed Area.⁴⁷

The court rejected the Hooses' argument that the warranty deed unambiguously conveyed title to the Disputed Area because it conveyed

36. *Id.* at 204.

37. *Id.*

38. 886 N.E.2d 83 (Ind. Ct. App. 2008).

39. *Id.* at 86.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.* at 86-87.

47. *Id.* at 87.

“propriatorship” to the property.⁴⁸ The court held that the “propriatorship” interest conveyed by the warranty deed was akin to a restrictive covenant limiting the Hooses’ ability to use that property⁴⁹ and thus was not fee simple ownership.⁵⁰ The court also concluded that the amended plat indicated the clear intention that lot seven would be part of the park in the Osborn Subdivision and that it had been used by the residents as a park for many years.⁵¹

The court of appeals also rejected Hooses’ argument that they owned fee simple title to the Disputed Area based upon the law of adverse possession.⁵² The Indiana Supreme Court recently rephrased elements of adverse possession in *Fraley v. Minger*,⁵³ holding that the doctrine of adverse possession entitles a person without title to obtain ownership of a parcel of property upon “clear and convincing proof of control, intent, notice, and duration.”⁵⁴ In addition, Indiana Code section 32-21-7-1 requires a party claiming property through adverse possession to pay “all taxes and special assessments that the adverse possessor or claimant reasonably believes in good faith to be due on the land or real estate during the period” of adverse possession.⁵⁵ The evidence was clear that the Hooses did not pay property taxes on the Disputed Area or lot seven.⁵⁶ In fact, lot seven was not included on the county tax rolls.⁵⁷ As a result, Hooses’ adverse possession claim failed.⁵⁸

Finally, the Hooses contended that they had acquired a prescriptive easement across the Disputed Area that allowed them continued exclusive use of the Disputed Area’s riparian rights.⁵⁹ The court ruled that this argument had been waived at the trial court, but the court also noted that the evidence necessary to support a prescriptive easement claim is different from that of adverse possession.⁶⁰ To acquire property through a prescriptive easement, a claimant must use or exercise control of the land for a specific purpose.⁶¹

48. *Id.* at 90.

49. *Id.* at 91.

50. *Id.*

51. *Id.*

52. *Id.* at 92-93.

53. 829 N.E.2d 476 (Ind. 2005).

54. *Id.* at 486.

55. *Hoose*, 886 N.E.2d at 91 (emphasis omitted).

56. *Id.* at 92.

57. *Id.*

58. *Id.*

59. *Id.* at 93.

60. *Id.* at 93-94.

61. *Id.* at 94.

II. RESTRICTIVE COVENANTS

A. *Fair Housing Act Violation Claim*

The homeowners association of the Villas West II of Willow Ridge Homeowners Association, Inc. brought suit against a homeowner to enforce a covenant prohibiting owners from leasing their residences.⁶² The homeowners filed a counterclaim alleging that the “no-lease” covenant violated the U.S. Fair Housing Act.⁶³ Mrs. McGlothin alleged that the covenant violated two different aspects of the Fair Housing Act: disparate impact and intentional discrimination.⁶⁴

The trial court ruled in Mrs. McGlothin’s favor, seemingly basing its decision largely on a finding of a disparate impact of the covenant on her as a homeowner.⁶⁵

The McGlothins purchased their home in the Villas West II with the common deed restriction that the property would be “subject ‘to any and all easements, agreements and restrictions of record.’”⁶⁶ The recorded covenants prohibited owners from leasing their residences as follows:

Lease of dwelling by owner. For the purpose of maintaining the congenial and residential character of Villas West II and for the protection of the Owners with regard to financially responsible residents, lease of a Dwelling by an Owner shall not be allowed. Each Dwelling shall be occupied by an Owner and their immediate family.⁶⁷

Mrs. McGlothin lived in the house until she broke her hip, at which time she moved to a nursing home.⁶⁸ Mr. McGlothin lived in the residence another five months until he too moved into the nursing home.⁶⁹ After Mr. McGlothin died, his daughter leased the house.⁷⁰ Approximately three years later, the Villas West II Homeowners’ Association told the daughter that leasing Mrs. McGlothin’s residence violated the no-lease covenant and demanded that the McGlothins comply with the covenant.⁷¹ During negotiations with the Villas West II Homeowners’ Association, counsel for Mrs. McGlothin argued that the lease was financially necessary to keep her in the nursing home and that the no-lease provision might be invalid because it may be construed as having “racially

62. *Villas West II of Willow Ridge Homeowner’s Assoc., Inc. v. McGlothin*, 885 N.E.2d 1274, 1277 (Ind. 2008).

63. *Id.*

64. *Id.* at 1277-78.

65. *Id.* at 1277.

66. *Id.*

67. *Id.*

68. *Id.* at 1277-78.

69. *Id.* at 1278.

70. *Id.*

71. *Id.*

discriminatory roots.”⁷²

The Homeowners’ Association refused to back away from enforcing the covenants and sued, explaining that they were concerned about the economic consequences that a violation could have on the neighborhood and their property values.⁷³ Mrs. McGlothin counter-claimed that enforcing the covenants violated the Fair Housing Act.⁷⁴

The trial court denied the Homeowners’ Association’s summary judgment motion and concluded that the no-lease covenant violated the Fair Housing Act, because it had greater adverse effects on African Americans and racial minorities.⁷⁵ The trial court further held that there was “no legitimate non-discriminatory reason” for the covenant and entered judgment for Mrs. McGlothin.⁷⁶ The trial court’s decision was affirmed by the Indiana Court of Appeals, and the Indiana Supreme Court granted transfer.⁷⁷

The court discussed the history of restrictive covenants in real estate and observed that they are often used to maintain or enhance the value of land by regulating the property use.⁷⁸ The court recognized that restrictions, such as those found in homeowners’ association declarations and master deeds, are considered by courts to have a strong presumption of validity because each purchaser of a residence purchases it knowing the restrictions and accepting that they will be imposed.⁷⁹ The court noted that the *Basso* court held that restrictions in a declaration—similar to covenants running with the land—would not be invalidated unless they were arbitrarily applied, violate public policy, or abrogate fundamental constitutional rights.⁸⁰ The court also observed that no lease restrictions are common and that they have been enforced by courts across the country.⁸¹

Notwithstanding the fact that restrictive covenants are generally enforceable, they still may be contrary to the Fair Housing Act, Title VIII of the Civil Rights Act of 1968 (FHA).⁸² The court stated that FHA claims are based on two theories: “disparate treatment or disparate impact.”⁸³ Disparate treatment claims require a showing of intentional discriminatory treatment of a protected class.⁸⁴ Disparate impact claims do not require proving intent and can be successful if a

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.* at 1278-79.

79. *Id.* at 1279 (citing *Hidden Harbor Estates, Inc. v. Basso*, 393 So. 2d 637, 639 (Fla. Dist. Ct. App. 1981)).

80. *Id.*

81. *Id.*

82. *Id.* at 1280.

83. *Id.*

84. *Id.*

covenant has a “*discriminatory effect* on a protected class, even if the policy or practice is” non-discriminatory on its face.⁸⁵ However, the court noted that although federal circuit courts generally have recognized that the FHA allows claims for disparate impact, there is no consensus concerning the analysis of such claims, and the U.S. Supreme Court has yet to address this issue.⁸⁶

The Seventh Circuit Court of Appeals has held recovery is possible for violating the FHA under the disparate impact theory when it is shown that a defendant’s conduct creates a discriminatory effect barred by the FHA.⁸⁷ The court in *Metropolitan Housing Development Corp. v. Village of Arlington Heights*⁸⁸ established four factors to use as the framework for analyzing such claims:

- (1) the strength of the plaintiff’s showing of discriminatory effect; (2) evidence of discriminatory intent, though not enough to satisfy the constitutional standard of *Washington v. Davis*⁸⁹; (3) the defendant’s interest in the challenged conduct; and (4) whether the plaintiff seeks affirmative relief or merely to restrain the defendant from interfering with individual property owners who wish to provide housing.⁹⁰

In *Villas West II*, the court held that because Title VII of the Civil Rights Act of 1968 and the FHA use the same language to express public policy prohibiting discrimination, courts should use the same framework to analyze both claims, rejecting the *Arlington Heights II* standard as unsound and choosing to employ the burden-shifting test previously adopted by the U.S. Supreme Court.⁹¹ Accordingly, the Indiana Supreme Court held that to establish the right to recover under a disparate impact claim under the FHA, a plaintiff must establish a *prima facie* case showing a policy or practice has a significant, actual or predictable impact on a protected class.⁹² To rebut this, “the defendant must then demonstrate that its policy or practice has a manifest relationship to a legitimate, non-discriminatory interest.”⁹³ The plaintiff may “overcome the defendant’s showing by demonstrating that a less discriminatory alternative would serve the defendant’s legitimate interest equally well.”⁹⁴

Applying this framework to the McGlothlin facts, the court found that the

85. *Id.* (emphasis added).

86. *Id.*

87. *Id.* at 1280-81.

88. 517 F.2d 409 (7th Cir. 1975).

89. “A statute, otherwise neutral on its face, must not be applied so as invidiously to discriminate on the basis of race.” 426 U.S. 229 (1976).

90. *Villas West II*, 885 N.E.2d at 1281 (quoting *Metro. Housing Develop. Corp. v. Village of Arlington Heights*, 558 F.2d 1283, 1290 (7th Cir. 1977)).

91. *Id.* at 1282; *see also* *Connecticut v. Teal*, 457 U.S. 440, 446-47 (1982); *Dotherd v. Rawlinson*, 433 U.S. 321, 329 (1977); *Albemarle Paper Co. v. Moody*, 422 U.S. 425 (1975).

92. *Villas West II*, 885 N.E.2d at 1283.

93. *Id.*

94. *Id.* at 1283-84.

homeowners' association had asserted a legitimate non-discriminatory reason for the no-lease covenant.⁹⁵ Supported by expert testimony, the finding recognized that tenants do not maintain rental homes as well as homeowners maintain their homes.⁹⁶ As a result, the prohibition in the declaration against renting residences benefits the homeowners by helping maintain their property values.⁹⁷

Because the court used the burden shifting test,⁹⁸ the burden of proof then shifted back to Mrs. McGlothin to propose an equally effective, but less discriminatory alternative to the non-lease restriction to maintain property values.⁹⁹ Mrs. McGlothin directed the court to other covenants in the declaration such as those requiring homeowners to "maintain windows, door hardware, patios, and appliances; water lawns and shrubs; keep the exterior free of trash, signs" and so forth.¹⁰⁰

The court concluded that those covenants were "not equally effective means of maintaining property values" when contrasted against the no-lease covenant.¹⁰¹ The court explained that maintaining property values goes beyond maintaining the property itself and includes improving and updating it.¹⁰² The covenants Mrs. McGlothin relied upon did not go this far.¹⁰³ The court also observed that, even though the record does not directly address this, ownership versus renting creates different motivation: "[I]t seems obvious that an owner-occupant is both psychologically and financially invested in the property to a greater extent than a renter."¹⁰⁴ The court concluded that because Mrs. McGlothin did not offer "equally effective, less discriminatory alternatives to the [homeowners' association's] legitimate, nondiscriminatory policy," the covenant did not produce a disparate impact, even if it disparately impacted a protected class.¹⁰⁵

As for Mrs. McGlothin's disparate treatment claim, she alleged that the covenant was designed to prefer, limit, or discriminate among persons who could occupy the homes, "based on race, color, sex, familial status, or national origin."¹⁰⁶ The court remanded the case to the trial court for further evidence and findings on this claim, concluding that the findings on intentional discrimination were contradictory and ambiguous.¹⁰⁷ Justice Rucker's dissent argued in favor of adopting the *Arlington Heights II* methodology, stating that abandoning the four factors of *Arlington Heights II* made it more difficult for housing

95. *Id.* at 1284.

96. *Id.* at 1283-84.

97. *Id.*

98. *Id.* at 1283.

99. *Id.* at 1284.

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.* at 1284-85.

106. *Id.* at 1285.

107. *Id.*

discrimination victims to make claims.¹⁰⁸

B. When Home Day Care Is a Business Use of Property

Another restrictive covenant case involved an issue of first impression for the Indiana Court of Appeals. *Lewis-Levett v. Day*¹⁰⁹ concerned an action brought by a developer seeking a temporary and permanent injunction against a homeowner's operation of a day care in her home.¹¹⁰ The restrictive covenants in the Golfview Estates declaration stated in pertinent part, "No lot nor any building erected thereon shall at any time be used for the purpose of any trade, business, manufacture or profession."¹¹¹ Lewis-Levett began operating a licensed child care facility in her home where she cared for up to twelve children.¹¹² About six months after the day care opened, the Days filed a complaint requesting a temporary and permanent injunction against Lewis-Levett's operation of the childcare business in her home.¹¹³ The trial court granted summary judgment in the Day's favor, and Lewis-Levett appealed, arguing that the operation of a licensed day care is a "residential use" of her home and, as a result, did not violate the restrictive covenants.¹¹⁴ She also argued that if operating a licensed day care in her home was held to be a business use, then "the enforcement of the restrictive covenants . . . violates Indiana public policy in favor of home day care."¹¹⁵ The trial court denied the Days' request for an injunction prohibiting Lewis-Levett from operating *any* day care in her home, thereby paving the way for her to operate an unlicensed, albeit smaller, day care in her home.¹¹⁶

The court distinguished this case from its previous consideration of whether an unlicensed home day care in *Stewart v. Jackson*¹¹⁷ constituted a business use of a residence.¹¹⁸ The day care in *Stewart* had four children which did not trigger the state's licensure statute.¹¹⁹ Lewis-Levett was caring for up to twelve children, and up to sixty percent of her home was used for a day care facility, according to her 2005 tax returns.¹²⁰ Based on these facts, the court concluded that the day care constituted a business use.¹²¹

108. *Id.* at 1286.

109. 875 N.E.2d 293 (Ind. Ct. App. 2008).

110. *Id.* at 295-96.

111. *Id.* at 294.

112. *Id.* at 295.

113. *Id.* at 294-95.

114. *Id.* at 295.

115. *Id.*

116. *Id.* at 295.

117. 635 N.E.2d 186 (Ind. Ct. App. 1994).

118. *Lewis-Levett*, 875 N.E.2d at 295-96.

119. *Id.* at 296; *see also* IND. CODE § 12-7-2-28.6(a) (Supp. 2008).

120. *Lewis-Levett*, 875 N.E.2d at 296.

121. *Id.* at 298.

The court then addressed the issue of whether or not a restrictive covenant prohibiting the use of the home as a day care facility was contrary to Indiana public policy favoring home day care.¹²² The court recognized that, although public policy in Indiana favors home day care, the General Assembly created a board to coordinate day care regulation and enacted licensing statutes to govern home day care.¹²³ Noting that state regulations distinguish between limited activities such as those in *Stewart*, compared to the licensed day care with twelve children in this case, the court concluded that enforcing the covenants did not conflict with Indiana public policy:

In other words, Indiana public policy favoring home day care does not supersede otherwise legitimate restrictive covenants prohibiting the use of lots in Golfview Estates for commercial purposes. Lewis-Levett operates a licensed day care home out of her residence, using sixty percent of her home for that purpose. . . . On the facts presented in this case, we cannot say that the trial court erred when it granted summary judgment enjoining Lewis-Levett from operating a licensed day care home at her residence in Golfview Estates.¹²⁴

C. Approval by Developer of Out-Buildings Survives Completion of Subdivision

Another restrictive covenant case of note was *Dreuter v. Duitz*,¹²⁵ where property owners erected a shed in violation of a subdivision's restrictive covenants. In this case, the court of appeals concluded that, although the covenants of the neighborhood allowed owners to build out-buildings, the covenants required property owners to obtain written approval from the developer or its assignee before erecting any building.¹²⁶ The court further held that the covenant continued to apply even after the initial development of the subdivision was completed.¹²⁷ The court also concluded that the covenant did not require owners to receive approval from all owners in the subdivision before constructing an out-building and that the covenants' non-waiver provision was enforceable.¹²⁸

III. LAND USE

A. Solid Waste Transfer Stations

The Indiana Supreme Court adopted a unique argument advanced in the

122. *Id.*

123. *Id.* at 296-98.

124. *Id.* at 298.

125. 883 N.E.2d 1194 (Ind. Ct. App. 2008).

126. *Id.* at 1200-01.

127. *Id.* at 1201.

128. *Id.* at 1202.

appeal of a Board of Zoning Appeals decision denying a petition for special exception to permit a property owner to build a solid waste transfer station. *600 Land, Inc. v. Metropolitan Board of Zoning Appeals* also took an interesting view of statutory interpretation.¹²⁹ The property was an eight-acre parcel of land zoned I-4-S, the heaviest industrial zoning classification of the Marion County Industrial Zoning Ordinance (IZO). Historically, the Indianapolis Department of Metropolitan Development (DMD), administrator of the IZO, and its staff required persons seeking to establish a solid waste transfer station to obtain a special exception to the IZO.¹³⁰ Based on this administrative requirement, 600 Land filed a special exception petition for the transfer station.¹³¹ Several property owners and business owners in the area remonstrated against the special exception, and the BZA denied the petition after a public hearing.¹³²

The property owner appealed the BZA's denial of the special exception and included a request for declaratory judgment that the IZO did not require 600 Land to obtain a special exception because the proposed use of the property as a transfer station qualified as a "motor truck terminal."¹³³ This is a use specifically permitted in an I-4-S district in Marion County without a special exception.¹³⁴

The trial court affirmed the denial of the special exception holding that the IZO required 600 Land to obtain a special use exception for a solid waste transfer station. The Indiana Court of Appeals affirmed the trial court's holding "that a special exception was required, but . . . reversed the BZA's denial of the special exception on grounds that its findings were not supported by the evidence."¹³⁵

The supreme court analyzed the IZO in great detail reaching the conclusion that the IZO's definition of a "motor truck terminal" included the operation of a transfer station as proposed by 600 Land.¹³⁶ The court noted that the IZO contains two elements: first, it is an area where trucks are "parked, stored, or serviced, including the transfer, loading or unloading of goods."¹³⁷ Second, a motor truck "terminal may include facilities for the temporary storage of loads prior to transshipment."¹³⁸ Because trash collection trucks used in 600 Land's proposed solid waste transfer station would be parked, stored, and serviced at the proposed solid waste transfer station, the court found that 600 Land met the first element of the motor truck terminal definition.¹³⁹ Finally, the court concluded that the trash that would be stored at the transfer station met the plain and

129. *600 Land v. Metro. Bd. of Zoning Appeals*, 889 N.E.2d 305 (Ind. 2008).

130. *Id.* at 307.

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.* at 309.

137. *Id.*

138. *Id.*

139. *Id.* at 310.

ordinary meaning of the word “load” and distinguished the use from the IZO requirement that a scrap metal or salvage storage or operation including automobile or truck wrecking or recycling, construction materials recycling or similar uses requires a special exception.¹⁴⁰

Also of interest in this case was a lengthy dissent by Justice Boehm, with Justice Dickson concurring.¹⁴¹ Justice Boehm took issue with the majority’s analysis of the ordinance, arguing that they failed to deal with the central legal issues in the case.¹⁴² First, the dissent argued that the majority failed to follow the rule of law requiring courts construing an ambiguous ordinance to give deference to the interpretation used by the administrative agency charged with enforcing the ordinance.¹⁴³ The dissent quoted *St. Charles Tower, Inc. v. Board of Zoning Appeals*,¹⁴⁴ stating that the “interpretation of a statute by an administrative agency charged with the duty of enforcing the statute is entitled to great weight, unless [the] interpretation would be inconsistent with the statute itself.”¹⁴⁵ Based on the rule from *St. Charles Tower*, the dissent concluded that a special exception was required for the transfer station and that interpreting the ordinance without resorting to rules of construction was appropriate.¹⁴⁶

The dissent also observed that the majority did not analyze the holdings by the court of appeals that “the BZA’s denial of the special exception was supported by sufficient evidence or whether 600 Land’s due process rights were denied at the BZA hearing.”¹⁴⁷ The dissent reviewed the BZA’s three findings and concluded that it would uphold the BZA’s decision because the BZA had determined, based on the evidence before it, that granting the special exception would be contrary to the IZO because it would allow a use that would not be in harmony with the character of the district and land.¹⁴⁸

600 Land’s due process claim was based on a statement by one of the BZA members during the hearing that she agreed with one of the remonstrators (a city-county councilor) that the “landfill” was not needed in Pike Township.¹⁴⁹ The dissent rejected this claim comparing the statement to commentary by judges during oral arguments, which is not evidence of a bias denying due process.¹⁵⁰

B. Regulation of Sexually Oriented Businesses

Many communities across the country have tried over the years to regulate

140. *Id.* at 311-12.

141. *Id.* at 312.

142. *Id.*

143. *Id.*

144. 873 N.E.2d 598, 603 (Ind. 2007).

145. *600 Land*, 889 N.E.2d at 312.

146. *Id.*

147. *Id.*

148. *Id.* at 313.

149. *Id.* at 314.

150. *Id.*

sexually oriented businesses through land use ordinances and business permits with varying degrees of success.¹⁵¹ In *Plaza Group Properties, LLC v. Spencer County Plan Commission*,¹⁵² the county sought injunctive relief against Plaza Group because it failed to apply for and obtain a building permit before renovating a truck stop for a sexually oriented business.¹⁵³

Plaza Group purchased a truck stop on October 21, 2005, and began remodeling the buildings without a building permit, although a county ordinance requires a building permit when the cost of alterations or modifications to structures or buildings exceeds \$5000.¹⁵⁴ When Spencer County learned about the remodeling, it issued a stop work order and filed a complaint for an injunction, alleging that Plaza Group was violating the county's building permit and zoning ordinances. The trial court issued a temporary restraining order based on Plaza Group's failure to comply with the county's ordinances and enjoined Plaza from operating a sexually oriented business at the site.¹⁵⁵

Plaza Group was the first company to try to operate a sexually oriented business in Spencer County in twenty years when it purchased the property. Prior to Plaza Group's purchase of the truck stop, Spencer County's zoning ordinance required sexually oriented businesses to obtain a special exception permit, but the zoning ordinances did not contain specific regulations for this type of business, including hours of operation and proximity to other land uses such as residences and schools.¹⁵⁶

In November 2005, the County Plan Commission held a public hearing and adopted an ordinance eighteen days later which provided that a sexually oriented business could not be located within 1000 feet of a "church, school, daycare center or preschool, or residence" (Ordinance 2005-10).¹⁵⁷ The county adopted a companion ordinance on December 28, 2005, specifically detailing the additional licensing requirements for sexually oriented businesses in the county and also containing the 1000 foot restriction. (Ordinance 2005-11).¹⁵⁸

After a request by the county for injunctions against Plaza Group, Plaza Group and the county entered into a preliminary injunction order in January 2006 enjoining Plaza Group "from occupying the property's main building before obtaining a building permit."¹⁵⁹ The parties also agreed that Plaza Group would not operate a sexually oriented business as defined by the county ordinance.¹⁶⁰

151. Clay Calvert & Robert D. Richards, *Stripping Away First Amendment Rights: The Legislative Assault on Sexually Oriented Businesses*, 7 N.Y.U. J. LEGIS. & PUB. POL'Y 287, 289 (2003-04).

152. 877 N.E.2d 877 (Ind. Ct. App. 2008).

153. *Id.* at 879-81.

154. *Id.* at 885.

155. *Id.* at 880.

156. *Id.*

157. *Id.* at 880-81.

158. *Id.*

159. *Id.* at 881.

160. *Id.*

Plaza Group then filed a counterclaim alleging that the ordinances were unconstitutional on their face as they violated the First Amendments of the U.S. Constitution and “related provisions of the Indiana Constitution.”¹⁶¹

Plaza Group’s First Amendment claim was based on the premise that it had an established non-conforming use because it purchased the property and had begun making repairs prior to the adoption of Ordinances 2005-10 and 2005-11.¹⁶² The court rejected Plaza Group’s constitutional claim, holding that the right of a business to maintain a non-conforming use is a question of state law.¹⁶³ The court summarized the general rule concerning whether a property owner acquires a “vested right” in its land use that a government cannot stop without triggering the due process or takings clauses of the Fifth Amendment which applies to states through the Fourteenth Amendment.¹⁶⁴ The court then analyzed the trial court record regarding the repairs made to the property and agreed with the finding that Plaza Group omitted many items from its calculation of repair costs and that Plaza Group had spent \$10,490, an amount well over the \$5000 threshold in the ordinance triggering the need for a building permit.¹⁶⁵ As a result, the court concluded that because Plaza Group had spent more than \$5000 to repair, alter and remodel the building, without the building permit as required by ordinance 2005-02, it was not a takings case.¹⁶⁶ The court also rejected Plaza Group’s argument that it was entitled to legally “nonconforming use status because the building permit ordinance” is not a zoning ordinance, noting that it had previously held that where a landowner fails to obtain a required building permit it could not acquire legally non-conforming use status when a subsequent zoning regulation was adopted.¹⁶⁷

The court concluded that Plaza did not furnish any evidence to dispute the county’s factual findings in support of its sexually oriented business ordinances and otherwise failed to cast direct doubt on the county’s rationale.¹⁶⁸ Therefore, the burden of proof did not shift to the county to provide evidence to renew its support for its substantial government interests in the ordinance.¹⁶⁹ The court rejected this argument noting that the ordinance states that a non-conforming “sexually oriented business must have existing ‘in all respects’ under law prior to the effective date of the ordinance to continue to operate.”¹⁷⁰

The court concluded that the evidence the county relied upon was reasonably believed to be relevant to the secondary effects of the sexually oriented business

161. *Id.*

162. *Id.* at 885-86.

163. *Id.* at 884.

164. *Id.*

165. *Id.* at 885-86.

166. *Id.*

167. *Id.* at 886-87 (citing *Bird v. Del. Muncie Metro. Plan Comm’n*, 416 N.E.2d 482, 488 (Ind. Ct. App. 1981)).

168. *Id.*

169. *Id.* at 892.

170. *Id.* at 886-87.

that the ordinance sought to address and that Plaza Group's challenge on these grounds failed.¹⁷¹

The court provided a thorough analysis of the constitutional issues in this case and the parameters in which an ordinance allegedly restricting free speech in this matter are to be examined.¹⁷² Plaza Group argued that the county was not entitled to summary judgment because sexually oriented business zoning ordinances are not narrowly tailored.¹⁷³ The court noted that the U.S. Supreme Court has addressed this question and has held that a local unit of government is not required to choose the least restrictive means to regulate free speech but rather the restriction may not be "substantially broader" than what is necessary to achieve the government's interest in the regulation.¹⁷⁴ The appellate court also rejected Plaza Group's argument that the 1000 foot restriction in the county's ordinances was an unreasonable restriction because of the rural nature of Spencer County.¹⁷⁵ The court rejected this argument noting that the county provided evidence that at least thirty-four alternative sites existed in Spencer County where Plaza Group could operate a sexually oriented business complying with the ordinance.¹⁷⁶

In conclusion, the court held that Spencer County's sexually oriented business ordinances "serve a substantial governmental interest while allowing for reasonable alternative avenues of" free speech.¹⁷⁷ Furthermore, the court noted that there was no evidence that the building permit ordinance was enacted or enforced for any reason other than the public safety and welfare of the residents of Spencer County.¹⁷⁸ Because Plaza Group "failed to cast direct doubt on the County's rationale for the ordinances, and the evidence relied upon by the County was held" to be reasonably believed to be "relevant to the secondary effects the County seeks to address with the ordinance, the challenge based on violation of the first amendment failed."¹⁷⁹ As a result, the court upheld the trial court's granting summary judgment in favor of the county.¹⁸⁰

IV. ECONOMIC DEVELOPMENT AREA ANNEXATION

In *Brenwick Associates, LLC v. Boone County Redevelopment Commission*,¹⁸¹ the Indiana Supreme Court ruled that the state's economic development statutes permit a county to establish an economic development area

171. *Id.* at 892.

172. *Id.* at 888-95.

173. *Id.* at 892.

174. *Id.* at 894.

175. *Id.* at 895.

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

181. 889 N.E.2d 289, 290 (Ind. 2008).

that included unincorporated land that a town was attempting to annex.¹⁸² Eleven days after Whitestown began annexation of unincorporated Boone County land, the county, through its Redevelopment Commission, initiated the creation of a special taxing district (economic development area) that included the same land, resulting in a power play resolved by the court.¹⁸³

Whitestown began annexation proceedings on July 24, 2006, but had not completed the annexation process by August 4, 2006, when Boone County began the process of establishing its economic development area encompassing the land in Whitestown’s annexation petition.¹⁸⁴ On September 25, 2006, Whitestown amended its annexation petition to include additional acreage, much of which overlapped with the county’s proposed economic development area.¹⁸⁵ On October 2, 2006, the Board of Commissioners of Boone County approved creating the economic development area.¹⁸⁶ Whitestown still had not completed its annexation at that time.¹⁸⁷

These moves set the stage for a case delving into the complicated process of municipal annexation and creating economic development areas.¹⁸⁸ Whitestown argued that the county should not be able to jump “in at the last minute and create an economic development area” in a place where municipal annexation was ongoing.¹⁸⁹ Boone County argued almost the opposite point, saying that by “simply filing an annexation [petition],”¹⁹⁰ a municipality could disrupt “orderly efforts to promote economic development in our State”¹⁹¹ and that such a move should be prohibited by the court.¹⁹²

The issue before that court was whether Whitestown’s initiating annexation proceedings could preclude Boone County from creating an economic development area including the same territory.¹⁹³ The court determined that Indiana Code sections 36-7-14-3 and 36-7-14-3.5—subsections of Indiana’s economic development statutes—governed its decision.¹⁹⁴

Indiana Code section 36-7-14-3 provides that once a county creates a redevelopment commission, all of the territory in the county, *except* areas within municipalities that have their own redevelopment commissions, constitutes a

182. *Id.*
183. *Id.*
184. *Id.*
185. *Id.*
186. *Id.*
187. *Id.*
188. *Id.*
189. *Id.* at 291 (quoting Brief of Amicus Curiae in Support of Appellant at 6).
190. *Id.* (quoting Brief of Amicus Curiae in Support of Appellees at 11-12 n.14). Interestingly, the Indiana Association of Cities and Towns (IACT) submitted an amicus brief supporting the county’s position and not that of its member, Whitestown. *See id.* at 291 n.5.
191. *Id.* at 291.
192. *Id.*
193. *Id.* at 290.
194. *Id.* at 292.

special county taxing district.¹⁹⁵ A county with a redevelopment commission can then create an economic development area *within* the special taxing district.¹⁹⁶

On the other hand, Indiana Code section 36-7-14-3.5 provides in part that a municipality with a redevelopment commission may annex an area of the county *after* the county has established a redevelopment district.¹⁹⁷ Upon *completion* of the annexation, the territory then becomes part of the municipality's redevelopment district.¹⁹⁸

The court noted that there are two instances in which county and municipal authority to establish redevelopment areas intersect and are at odds with one another.¹⁹⁹ In both situations, a municipal redevelopment district would overlap the territory included in a county redevelopment district.²⁰⁰ The first situation creating a conflict occurs when a municipality that does not have a redevelopment commission decides to establish one after its county has established a redevelopment district²⁰¹ (that was not the situation in *Brenwick*). A second conflict occurs when a municipality with a redevelopment commission attempts to annex territory that falls within an existing county redevelopment district.²⁰² Because Boone County's economic development area was created before Whitestown completed annexation, the court determined that the second conflict scenario applied in this case.²⁰³

There are, though, rules in these types of annexations to secure continued payment to the county for any outstanding bonds or other obligations.²⁰⁴ The county redevelopment commission continues to receive tax allocations from the annexed property as long as outstanding obligations exist, even upon annexation and control of the property by the municipality.²⁰⁵

The court held that subsections 36-7-14-3 and 36-7-14-3.5 of Indiana's economic development statute provide a comprehensive statement of the law regarding these types of disputes between units of local government.²⁰⁶ Relying on these subsections, the court concluded that because Whitestown had not completed its annexation proceedings, the county had the authority to create an economic development area including the not yet annexed territory.²⁰⁷ The court, however, noted that according to Indiana Code section 36-7-14-3.5, "the county's establishment of the [economic development area] does not preclude or interfere

195. IND. CODE § 36-7-14-3 (2007).

196. *Id.*

197. *Brenwick*, 889 N.E.2d at 292 (citing IND. CODE § 36-7-14-3.5 (2007)).

198. *Id.*

199. *Id.* at 293.

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.* (citing IND. CODE § 36-7-14-3.5 (2007)).

205. *Id.*

206. *Id.* at 294.

207. *Id.*

in any way with Whitestown's ability to initiate or complete annexation."²⁰⁸ As a result, even though Whitestown could continue to pursue annexation, it would not reap the benefit of any additional taxation from the annexed territory until all existing county bonds and other obligations were repaid.²⁰⁹ Once annexation is completed, however, the disputed area will otherwise be subject to municipal jurisdiction of the town of Whitestown.²¹⁰

V. GOVERNMENT ACQUISITION OF LAND THROUGH ADVERSE POSSESSION

The court of appeals encountered an issue of first impression regarding adverse possession in *State v. Serowiecki*,²¹¹ where it addressed whether the legislature, when it enacted the adverse possession tax statute,²¹² intended to remove the state's ability to acquire property through adverse possession.²¹³

In 1945, the Indiana Department of Natural Resources (the DNR) acquired a piece of land now known as the Beaver Lake Prairie Chicken Refuge (the Refuge).²¹⁴ At issue in the case was an 18.6-acre wedge of land between the Refuge and the neighboring property.²¹⁵ When both pieces of land were surveyed originally, the boundary line for the area in dispute was not depicted because the area was underwater in Beaver Lake.²¹⁶ Later, the lake was drained and a ditch was built at an angle different from the surrounding forty-acre square tracts, thus creating the wedge in dispute.²¹⁷ The DNR believed that this ditch and a parallel fence line represented the boundary line, while the neighboring property owner maintained that the boundary line created a square tract like the boundaries between the surrounding plat sections.²¹⁸

The DNR filed an action to quiet title on the disputed tract and later filed a motion for summary judgment.²¹⁹ The trial court heard argument on the motion and granted summary judgment against the DNR, finding that the DNR did not obtain legal title to the property, either by inverse condemnation or adverse possession.²²⁰ The court relied on the facts that the neighboring property owner's deed described her property as including the disputed land, and the neighboring property owner paid taxes on the disputed land.²²¹ In making its decision, the

208. *Id.* at 295.

209. *See id.* at 293 n.10.

210. *Id.*

211. 892 N.E.2d 194 (Ind. Ct. App. 2008).

212. IND. CODE § 32-21-7-1 (2008).

213. *Serowiecki*, 892 N.E.2d at 202-03.

214. *Id.* at 196.

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.* at 196-97.

219. *Id.* at 198.

220. *Id.* at 198-99.

221. *Id.* at 199.

court also noted that, “[n]o reasonable person could infer anything other than the DNR’s property ended at the straight Section line between [the sections]” meaning that the [DNR] was wrong in assuming that the diagonal ditch and fence line represented the legal boundary line.²²²

The court of appeals looked to Indiana Code section 32-21-7-1, Indiana’s adverse possession tax statute,²²³ which outlines that, in addition to common law adverse possession requirements, a party claiming adverse possession must show that he has “paid and discharged all taxes and special assessments” believed to be due on the land.²²⁴ The DNR had not paid any taxes on the property, nor had it discharged the taxes so that no one else was required to pay them.²²⁵ Like the trial court, the court of appeals interpreted the adverse possession tax statute as requiring one or the other of those to be true.²²⁶ The court further held that the statute did not contain an exception for governmental units, so the DNR needed to have met those requirements to have adversely possessed the land.²²⁷

VI. RIPARIAN RIGHTS

A. *Water Views as Riparian Rights*

In *Center Townhouse Corp. v. City of Mishawaka*,²²⁸ the court of appeals addressed an issue of first impression in Indiana when it refused to include the right to an unobstructed water view within a property owner’s bundle of riparian rights.²²⁹

As part of a riverfront redevelopment project, the city of Mishawaka constructed a pedestrian bridge over a channel between two city-owned properties, Lincoln Park and Kamm Island.²³⁰ Once completed, the bridge was seven feet high and ran parallel to the waterfront side of a series of three-story townhomes.²³¹ With a length of 140 feet, the bridge obstructed the first-floor views from each of the townhomes.²³²

Individual townhome owners and Center Townhouse Corporation (CTC), the townhome association for the housing development, brought an inverse condemnation action against the city and the city’s parks and recreation board.²³³ The homeowners and CTC claimed that their riparian rights included the water

222. *Id.*

223. *Id.* at 202.

224. *Id.*

225. *Id.* at 202-03.

226. *Id.* at 200, 203.

227. *Id.* at 203.

228. 882 N.E.2d 762, 772 (Ind. Ct. App. 2008).

229. *Id.* at 765.

230. *Id.* at 776.

231. *Id.* at 766.

232. *Id.*

233. *Id.*

view from their properties.²³⁴ They argued further that the bridge blocked their view of the channel and river, and as a result, the loss of view was a compensable taking under Indiana's eminent domain statute.²³⁵

The trial court agreed with the plaintiffs, determining that the bridge affected a taking,²³⁶ however, in a subsequent trial on damages, the jury did not award damages to the homeowners or CTC.²³⁷ In the court of appeals case, the city argued that there was insufficient evidence to support the taking, while the homeowners and CTC appealed the damages verdict.²³⁸

In its decision, the court of appeals presumed a taking had occurred because the city failed to include a transcript of the trial court's decision as required by Indiana Appellate Rule 9(F)(4).²³⁹

Although the court of appeals presumed that the bridge affected a taking, it concluded that an unobstructed water view was not a riparian right compensable under an inverse condemnation action.²⁴⁰ Instead, the court determined that, "[t]he scope of a landowner's view, whether of the water or otherwise, is a policy decision best left to the legislative branch generally and the local zoning authorities specifically."²⁴¹

The court explained further that if it were to recognize a water view as a compensable riparian right, any taking would be held to the same standard as other property rights takings.²⁴² That is, the loss of view would have to "result in 'substantial interference with private property which destroys or impairs one's free use and enjoyment of the property or one's interest in the property.'"²⁴³ The court relied upon reasoning in the Indiana Supreme Court's recent *Biddle v. BAA Indianapolis, LLC* decision where the court held that a "mere inconvenience" is insufficient for a takings claim.²⁴⁴

B. Riparian Right Boundary Lines

With *Lukis v. Ray*,²⁴⁵ the Indiana court of appeals reexamined the idea of establishing fixed guidelines for determining riparian right boundary lines. In the end, it maintained the status quo, asserting that "there is no fixed rule governing

234. *Id.*

235. *Id.* at 770 (citing IND. CODE § 32-24-1-16 (2008)).

236. *Id.* at 769.

237. *Id.* at 765.

238. *Id.* at 767.

239. *Id.* at 769 (citing IND. APP. R. 9(F)(4)).

240. *Id.* at 770-71.

241. *Id.* at 772.

242. *Id.*

243. *Id.* (quoting *Bd. of Comm'rs of Vanderburgh County v. Joeckel*, 407 N.E.2d 274, 278 (Ind. Ct. App. 1980)).

244. *Id.* (citing *Biddle v. BAA Indianapolis, LLC*, 860 N.E.2d 570, 580 (Ind. 2007)).

245. 888 N.E.2d 325 (Ind. Ct. App. 2008).

such [riparian boundary] disputes.”²⁴⁶

Lukis (appellant), Ray and the Blackburns (the appellees) each owned abutting lakefront properties situated on a cove.²⁴⁷ Lukis installed a pier that was longer, wider, and ten feet closer to the Blackburns’ western property line than his previous pier had been. In a chain reaction, appellees each moved his pier further east to maintain lake access.²⁴⁸ In doing so, Ray positioned his pier along his easternmost property line in such a way that his docked pontoon encroached on his eastern neighbor’s property.²⁴⁹ Ray filed an action with the Natural Resources Commission (NRC) against Lukis for infringing on his riparian rights to access the lake.²⁵⁰

In that action, the NRC’s Administrative Law Judge (ALJ) determined that riparian rights extended into the lake from the onshore property lines.²⁵¹ The ALJ concluded that using this calculation resulted in “a just apportionment between the respective parties based upon the amount of shoreline of each owner.”²⁵² Lukis, whose property included the longest lake frontage, benefitted from this definition and was found not to have infringed on appellees’ riparian rights.²⁵³

On an appeal to the trial court, the court held that the ALJ’s decision was contrary to law.²⁵⁴ It found that the ALJ incorrectly apportioned the riparian zones associated with the properties because it did not follow the apportionment method laid out in *Nosek v. Stryker*,²⁵⁵ a Wisconsin appellate court decision, whose reasoning the ALJ effectively adopted in its decision.²⁵⁶ In *Nosek*, properties with irregularly-shaped property lines were granted navigable waterfronts proportionate to each property’s shore length.²⁵⁷

The court of appeals revisited the apportionment question and deferred to the NRC ALJ’s decision.²⁵⁸ Instead of adopting *Nosek*’s apportionment methods, the appellate court allowed a previous Indiana Court of Appeals’ principle to stand: “there is no set rule for establishing the extension of boundaries into a lake between contiguous shoreline properties.”²⁵⁹

Interestingly, after the court’s decision, the NRC published a non-rule policy document outlining detailed guidelines for determining riparian boundaries

246. *Id.* at 332.

247. *Id.* at 326-27.

248. *Id.* at 326.

249. *Id.* at 327.

250. *Id.*

251. *Id.*

252. *Id.* (internal quotation omitted).

253. *Id.* at 328.

254. *Id.* at 330.

255. 309 N.W.2d 868 (Wis. Ct. App. 1981).

256. *Lukis*, 888 N.E.2d at 329-30.

257. *Id.* at 329-30 (citing *Nosek*, 309 N.W.2d 868).

258. *Id.* at 332.

259. *Id.*

within navigable waters and public freshwater lakes.²⁶⁰ The document's guidelines do not have the effect of law, but were created to assist with "interpreting, supplementing, and implementing the [NRC's] responsibilities."²⁶¹ The guidance document reflects many of the comments made by the various courts in this case.²⁶² First, it adopts apportionment methods similar to those found in *Nosek*.²⁶³ Second, it addresses a related concern regarding restrictive covenants, giving precedent to any apportionment method found within them over the detailed apportionment methods found in the non-rule policy document.²⁶⁴

VII. MECHANIC'S LIENS

The court of appeals directly addressed Indiana Code section 32-28-3-5(d), Indiana's recently amended Mechanic's Lien statute, for the first time in *Harold McComb & Son, Inc. v. JPMorgan Chase Bank, NA*,²⁶⁵ when it determined that, where funds from a loan secured by the mortgage on commercial property are for "the specific project that gave rise to the mechanic's lien, the mortgage lien has priority over the mechanic's lien recorded after the mortgage."²⁶⁶

Indian Village, the property owner, executed a mortgage on each of two properties with Bank One, JPMorgan Chase Bank's (Chase) predecessor.²⁶⁷ McComb & Sons, Inc. (McComb) and American Renovations of Indiana, Inc. (API) served as general contractors for a senior housing complex rehabilitation project on the Indian Village property.²⁶⁸ Both McComb and API substantially completed all work on the project by November 2004.²⁶⁹ Months later, neither had received payment in full for its services.²⁷⁰ As a result, both general contractors filed mechanic's liens against Indian Village.²⁷¹ Because Indian Village had not paid off its mortgages by the date specified in its loan agreements with Chase, the bank sought payment as well.²⁷²

McComb, API, and Chase filed complaints to foreclose on the mechanic's

260. Natural Resource Commission, Information Bulletin #56, First Amendment, *Riparian Zones Within Public Freshwater Lakes and Navigable Waters*, posted Dec. 10, 2008, IND. REG., 20081210-IR-312080891NRA.

261. *Id.* at 1.

262. *Id.*

263. *See id.* at 3-9.

264. *See id.* at 3.

265. 892 N.E.2d 1255 (Ind. Ct. App. 2008).

266. *Id.* at 1262.

267. *Id.* at 1256.

268. *Id.*

269. *Id.*

270. *Id.*

271. *Id.*

272. *Id.* at 1256-57.

liens and mortgages, respectively.²⁷³ After the trial court consolidated the actions, Chase filed a motion for summary judgment.²⁷⁴ The trial court granted the motion and ordered foreclosure of Chase's mortgages, determining that mortgage liens "are superior to the interests of all of the other [lien holders]."²⁷⁵

At issue in the appellate court's case was whether the trial court erred in how it prioritized the parties' liens.²⁷⁶ McComb and API argued that, through an exception granted in Indiana Code section 32-28-3-2, Indiana law favored its mechanic's liens over Chase's mortgages.²⁷⁷ In contrast, Chase argued that Indiana Code section 32-28-3-5(d) applied and "[gave] absolute priority to earlier-recorded mortgages over later-recorded mechanic's liens on commercial property."²⁷⁸

The court of appeals determined that Indiana Code section 32-28-3-2 provides the general rule with regard to priority over improvements, but Chase appropriately argued that Indiana Code section 32-28-3-5(d) applied in this case.²⁷⁹ The court, however, did not adopt Chase's reasoning.²⁸⁰ Instead, it emphasized that the legislature created the subsection in order to fill a gap created by Indiana Code section 32-28-3-2 and another relevant provision, Indiana Code section 32-21-4-1(b).²⁸¹ In its decision, the court of appeals held what had been stated previously only in dicta in a dissenting opinion in *Provident Bank v. Tri-County Southside Asphalt, Inc.*²⁸² by Judge Sharpnack.²⁸³ Where the "funds from the loan secured by the mortgage are for the project which gave rise to the mechanic's lien . . . the mortgage lien has priority over the mechanic's lien recorded after the mortgage."²⁸⁴

VIII. REMEDIES FOR BREACH OF LEASE IN LIGHT OF WRONGFUL EVICTION

The court of appeals ruled in *Village Commons v. Marion County Prosecutor's Office*²⁸⁵ that the language of a lease looked at by itself would have limited a tenant's access to certain remedies, but because the lessor wrongfully

273. *Id.* at 1257.

274. *Id.*

275. *Id.* (quoting Appellants' app. 50).

276. *Id.* at 1256.

277. *Id.* at 1259.

278. *Id.* at 1260.

279. *Id.*

280. *Id.*

281. *Id.* Indiana Code sections 32-21-4-1(b) and 32-28-3-2 address the prioritization of liens, but they do not address prioritizing mechanic's liens on improvements to commercial property and mortgage liens. See IND. CODE §§ 32-21-4-1(b), 32-28-3-2 (2008).

282. 804 N.E.2d 161 (Ind. Ct. App. 2004).

283. *Harold McComb & Son*, 892 N.E.2d at 1262.

284. *Provident Bank*, 804 N.E.2d at 169 (Sharpnack, J., dissenting).

285. 882 N.E.2d 210 (Ind. Ct. App. 2008).

evicted the tenant, the tenant had access to those remedies.²⁸⁶

The Marion County Prosecutor's Office (Prosecutor's Office) leased space from Village Commons and Rynalco, Inc. (collectively, landlord).²⁸⁷ The Prosecutor's Office used the space for its Grand Jury Division offices and evidence storage.²⁸⁸ The lease began on August 1, 1999 and was to run for a period of seven years and five months.²⁸⁹

From March 2001 to January 2003, several external water leaks, leaks from building equipment, and a sewage leak damaged both building and Prosecutor's Office property.²⁹⁰ The leaks led to mold and other microbial contamination throughout the leased space.²⁹¹ Two days after one particularly severe leak, where water poured from the ceiling, the Prosecutor's Office vacated the premises on January 30, 2003.²⁹² After it vacated, the Prosecutor's Office stopped paying rent, leaving a total of \$380,477.37 unpaid under the lease agreement.²⁹³

The Landlord filed a complaint against the Prosecutor's Office for breach of lease in order to collect damages as provided by the lease.²⁹⁴ The Prosecutor's Office counterclaimed, alleging constructive eviction.²⁹⁵ The landlord argued that the exclusive-remedy provision in the lease prohibited the Prosecutor's Office from seeking remedies outside of those provided in the lease.²⁹⁶ Key provisions of the lease required the landlord to maintain plumbing, heating and similar equipment and to maintain the premises in good repair.²⁹⁷ If the landlord breached the lease, the Prosecutor's Office could "'sue for injunctive relief or to recover damages for any loss resulting from the breach, but [it would] not be entitled to terminate this Lease or withhold, setoff or abate any rent due thereunder.'"²⁹⁸

At a bench trial, the trial court held that the Prosecutor's Office was not barred by the exclusive-remedy provision in the lease from asserting a wrongful eviction defense and that the Prosecutor's Office was actually and constructively evicted from the property.²⁹⁹ As a result, the trial court awarded the Prosecutor's

286. *Id.* at 217.

287. *Id.* at 212.

288. *Id.*

289. *Id.*

290. *Id.*

291. *Id.* at 213.

292. *Id.* at 214.

293. *Id.*

294. *Id.*

295. *Id.*

296. *Id.* at 215.

297. *Id.* at 212.

298. *Id.* (citing Appellant's add. to Brief, tab 1).

299. *Id.* at 214. The court provided the following definitions of actual and constructive eviction: "[A]ctual eviction occurs when a tenant is deprived of a material part of the leased premises, and constructive eviction occurs when an interference with possession so serious that it

Office \$7664 in damages.³⁰⁰

The court of appeals ruled that the language of the lease was unambiguous, and as a result, the Prosecutor's Office "did not have the right to terminate the Lease or withhold, setoff, or abate any rent due."³⁰¹ The court, however, did not find that particular conclusion dispositive in the case.³⁰² Instead, the court relied on an earlier court of appeals holding in *Sigsbee v. Swathwood*,³⁰³ providing that a lessor's act or omission, not a lessee's, ended the lessee's obligation to pay rent given an actual or constructive eviction.³⁰⁴

IX. NEW STATUTES EFFECTIVE JULY 1, 2008

Indiana Code section 36-1-11-5.9 allows a county to transfer real property that it acquired through property tax default to an abutting property owner for nominal or no consideration.³⁰⁵ The new law requires that the county notify all abutting landowners before initiating negotiations for a sale or transfer of the property through a sheriff's sale.³⁰⁶ The law formerly required the county to hire an appraiser and an auctioneer or sales broker to complete the sale.³⁰⁷ One goal of the new law is to reduce the time required to get the property back on the tax rolls.³⁰⁸

Indiana Code section 32-29-7-3 eliminates the requirement that a county sheriff post notice of a foreclosure sale in at least three public places in each township where the property is located.³⁰⁹ The law maintains the requirement that the sheriff post notice of the sale at the county courthouse where the property is located.³¹⁰

New legislation regarding smoke detectors in rental properties is scattered throughout a number of Indiana Code sections, including Indiana Code sections 22-11-18-5.5, 32-31-5-7, 32-31-7-5, and 36-8-17-8.³¹¹ Landlords must provide operative smoke detectors in rental properties at the time a tenant moves into the

deprives the lessee of the beneficial enjoyment of the leased premises.'" *Id.* at 217 (quoting *Talbott v. English*, 59 N.E. 857, 860 (Ind. 1901)).

300. *Id.* at 214.

301. *Id.* at 216.

302. *Id.*

303. 419 N.E.2d 789, 795 (Ind. Ct. App. 1981).

304. *Village Commons*, 882 N.E.2d at 217.

305. IND. CODE § 36-1-11-5.9 (Supp. 2008).

306. *Id.*

307. Indiana Department of Local Government Finance, *Additional Bills of Interest*, <http://www.in.gov/dlgf/5136.htm> (last visited July 12, 2009).

308. The Common Council of the City of Michigan City, Indiana, *Regular Meeting—February 19, 2008*, www.emichigancity.com/cityhall/council/pdf/minutes021908.pdf.

309. IND. CODE § 32-29-7-3 (2008).

310. *Id.*

311. *Id.* §§ 22-11-18-5.5, 32-31-5-7.

unit.³¹² A landlord commits a Class B infraction by failing to properly install a smoke detector or by failing to repair an inoperative hard-wired detector within seven days of notice of the problem.³¹³ The new law provides that neither landlord nor tenant can waive the smoke detector requirement.³¹⁴ It requires further that tenants maintain functioning smoke detectors in the unit.³¹⁵ Tenants must ensure that detectors in the unit are not disabled, that battery-powered devices operate (i.e., tenants must install batteries), and if a hard-wired detector malfunctions, tenants must provide written notice to landlords.³¹⁶ The new law does not impose penalties if a tenant fails to comply with the statute.³¹⁷ Another component of the new law allows an owner or primary lessee who resides in a private dwelling to request that the fire department inspect the interior of the dwelling to determine compliance with the smoke detector requirements.³¹⁸

Indiana Code section 32-31-3-7 was amended to apply residential landlord-tenant statutes to rental agreements that give the tenant an option to purchase the rented property.³¹⁹ The statute applies to agreements entered into after June 30, 2008 on all types of dwelling units, including multi- and single-family units.³²⁰

Indiana Code sections 14-26-2-1.2 and 14-26-2-14.5 update Indiana's Lake Preservation Law regarding riparian rights to establish a definition of acquiescence³²¹ and evidentiary standards for determining when a riparian property owner acquiesces to allowing public use of a lake.³²² Indiana Code section 14-26-2-1.2 defines acquiescence as "consent without conditions, tacit or passive compliance, or acceptance."³²³ Factors indicating acquiescence of a riparian owner to allow public use of a lake include:

- (1) Evidence that the general public has used the lake for recreational purposes.
- (2) Evidence that the riparian owner did not object to the operation by another person of a privately owned boat rental business, campground, or commercial enterprise that allowed nonriparian owners to gain access throughout the lake.
- (3) A record of regulation of previous construction activities on the lake by the department or the department of conservation (before its

312. IND. CODE §§ 32-31-7-5 (2008), 36-8-17-8 (Supp. 2008).

313. IND. CODE § 22-11-18-5.5 (Supp. 2008).

314. IND. CODE § 32-31-5-7 (2008).

315. *Id.* § 32-31-7-5.

316. *Id.* § 32-31-7-5(6).

317. *See* IND. CODE § 22-11-18-5.5 (Supp. 2008).

318. *Id.* § 36-8-17-8.

319. IND. CODE § 32-31-3-7 (2008).

320. *Id.*

321. *Id.* § 14-26-2-1.2.

322. *Id.* § 14-26-2-14.5.

323. *Id.* § 14-26-2-1.2.

repeal).³²⁴

The amendments also provide that when the Indiana Department of Natural Resources is a party to an adjudication finding a lake to be private, the law does not apply.³²⁵

324. *Id.* § 14-26-2-14.5.

325. *Id.* § 14-26-2-14.5(b).

RECENT DEVELOPMENTS IN INDIANA TAXATION SURVEY 2009

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INTRODUCTION: SOME REFERENCES USED IN THIS ARTICLE

This Article highlights the major tax developments that occurred through the calendar year of 2008. Whenever the term “GA” is used in this Article, such term refers only to the 115th General Assembly. Whenever the term “Governor” is used in the Article, such term refers only to the Governor of Indiana who was serving in office during the 115th General Assembly. Whenever the term “Tax Court” is referred to in this Article, such term refers only to the Tax Court. Whenever the term “DLGF” is used in this Article, such term refers only to the Indiana Department of Local Government Finance. Whenever the term “IBTR” is used in this Article, such terms refers only to the Indiana Board of Tax Review. Whenever the term “SBTC” is used in this Article, such term refers only to the Indiana State Board of Tax Commissioners. Whenever the term “Department” is used in this Article, such term refers only to the Indiana Department of State Revenue. Whenever the term “IC” or “Indiana Code” is used in this Article, such term refers only to the Indiana Code which is in effect at time of the publication of this Article. Whenever the term “ERA” is used in this Article, such term refers only to an Indiana Economic Revitalization Area. Whenever the term “CAGIT” is used in this Article, such term refers only to the Indiana County Adjusted Gross Income Tax. Whenever the term “COIT” is used in the Article, such term refers only to the Indiana County Option Income Tax. Whenever the term “LOIT” is used in this Article, such term refers only to the Local Option Income Tax. Whenever the term “IEDC” is used in this Article, such term refers only to the Indiana Economic Development Corporation. Whenever the term “CEDIT” is used in this Article, such term refers only to the Indiana County Economic Development Income Taxes. Whenever the term “IEDIT” is used in this Article, such term refers only to the Indiana Economic Development Income Tax. Whenever the term “BMV” is used in this Article, such term refers only to the Indiana Bureau of Motor Vehicles. Whenever the term “IRC” is used in this Article, such term refers only to the Internal Revenue Code which is in effect at the time of the publication of this Article. Whenever the term “AOPA” is used in this Article, such term refers only to the Indiana Administrative Orders and Procedures Act. Whenever the term “CBTCPR” is

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used in this Article, such term refers only to the County Board of Tax and Capital Projects. Whenever the term "PTABOA" is used in this Article, such term refers only to a Property Tax Assessment Board of Appeals.

I. ENACTMENTS OF NEW STATUTES AND AMENDMENTS TO EXISTING STATUTES

The 115th GA passed several pieces of legislation affecting various areas of state and local taxation including changes to: property taxes; income taxes; sales and use taxes; and tax procedures.

A. Property Tax Statutory Provisions and Related Statutory Provisions

The GA amended the definition of "assessing official" at IC 6-1.1-1-1.5 to include a "county assessor."¹

The GA amended IC 6-1.1-1-8.4 to add a definition of "inventory."² The new definition includes "items that qualify as inventory through 50 IAC 4.2-5-1," such as tangible personal property held for sale in the ordinary course of business and property which is used in the production or processing of property to be sold.³

The GA amended IC 6-1.1-1-11 to modify the definition of "personal property."⁴ As a result, the definition now includes property that is held as an investment or "depreciable personal property."⁵ However, the definition excludes "inventory."⁶

The GA amended IC 6-1.1-2-7 to exempt "inventory" from assessment and taxation⁷ and the amended portion was made retroactive to January 1, 2008.⁸

The GA amended IC 6-1.1-4-17 to modify the procedures for real property assessment.⁹ The section now grants county assessors (subject to the approval of the DLGF) the authority to employ "professional appraisers as technical advisors for assessments in all townships in the county."¹⁰ The decision of a county assessor "to not employ" a professional appraiser is also subject to approval by the DLGF.¹¹

The GA amended IC 6-1.1-4-19.5 to state that, in developing contracts used for "securing professional appraising services" the DLGF must include in the

1. 2008 Ind. Acts 2362.

2. *Id.* at 2362-63.

3. *Id.* at 2363.

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.* at 2364.

8. *Id.*

9. *Id.* at 2374.

10. *Id.*

11. *Id.*

contracts a provision stating that the DLGF is a party to the contract.¹²

The GA amended IC 6-1.1-4-28.5.¹³ The section now states that money assigned to a “property reassessment fund” through IC 6-1.1-4-27.5 may now be used to fund “payments to assessing officials and hearing officers for county property tax assessment boards of appeals.”¹⁴

The GA amended the “Assessed Value Deductions and Deduction Procedures” portion of the Indiana Code to include new definitions that are applicable to IC 6-1.1-12.¹⁵ For example, IC 6-1.1-12-37 now includes definitions for “dwelling” and “homestead.”¹⁶ In addition, effective January 1, 2009, IC 6-1.1-12-37 requires the DLGF to “adopt” rules or guidelines for applying the deduction which is allowable through that section.¹⁷ The new section also states that a county auditor may not grant “an individual or a married couple” a deduction if: (1) the individual or married couple has claimed the deduction on more than one application, and (2) the two applications claim the deduction for different property.¹⁸

The GA added a new section to IC 6-1.1-12-37.5.¹⁹ Through the new section, a person entitled to a standard deduction for real property through IC 6-1.1-12-37, the standard deduction for homesteads, is also entitled to a “supplemental deduction.”²⁰ The supplemental deduction is to be applied after the standard deduction, “but before the application of any other deduction, exemption, or credit.”²¹ The supplemental deduction is equal to 35% of the assessed value of the property that is not more than \$600,000, plus 25% of the assessed value of the property that exceeds \$600,000.²²

The GA amended IC 6-1.1-15-1 to grant taxpayers the ability to have the PTABOA review “either or both” the taxpayer’s assessment of tangible property or a deduction which is authorized by the statute.²³

The GA amended the “Tax Increment Replacement” portion of IC 6-1.1-21.2-12.²⁴ The section now applies if the tax increment replacement amount in an allocation area is greater than zero.²⁵ After a public hearing, a governing body may (1) impose a special assessment on property owners in the area to raise an amount that does not exceed the tax increment replacement, (2) impose a tax on

12. *Id.* at 2376.

13. *Id.* at 2380-81.

14. *Id.* at 2381.

15. *See id.* at 2413.

16. *Id.*

17. *Id.* at 2415.

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.* at 2446.

24. *Id.* at 2549.

25. *Id.*

all taxable property in the district of the governing body to raise an amount that does not exceed the tax increment replacement amount, and (3) reduce the base assessed value of property to an amount that increases the tax increment revenues in the area to an amount that does not exceed the tax increment replacement amount.²⁶ After the proposal of the governing body is submitted to the legislative body of the unit that established the district, the legislative body can reduce the assessment, increase the assessment, or choose to take no action.²⁷ Any person who files a written remonstrance with the governing body, and is "aggrieved" by the action taken, has ten days after the action to object.²⁸ Further, if such remonstrating person wishes to proceed further with respect to this matter, then such remonstrator must file an action in the circuit or superior court.²⁹ However, the only ground with respect to which a remonstrator may object "is whether the proposed special assessment or tax will help achieve the redevelopment of economic development objectives for the allocation area or honor its obligations related to the allocation area."³⁰ The judgment of the circuit or superior court is conclusive unless an appeal is taken.³¹

The GA added new section IC 6-1.1-21.2-16.³² If the tax increment replacement amount for an allocation area in a district is less than zero, then that district's governing body "shall increase the base assessed value of property in the allocation area" to an amount that will bring the tax increment replacement amount to zero.³³

The GA added another new section at IC 6-1.1-22.5-18.5.³⁴ This new section allows county councils to adopt an ordinance that will allow taxpayers to make installment payments with their "Provisional Property Tax Statements." The ordinance must give taxpayers the option of paying the tax due under the reconciling statement by installment due dates set forth in the ordinance.³⁵ For any delinquent amount of real or personal property taxes, the section imposes a penalty of 5% of the delinquent amount.³⁶ Further, the new section makes it clear that a county council does not need approval from the DLGF in order to adopt the ordinance.³⁷

The GA also added new section IC 6-1.1-30-17.³⁸ The section provides that, upon request of the DLGF, the Department and the auditor of state shall withhold

26. *Id.* at 2550.

27. *Id.*

28. *Id.* at 2551.

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.* at 2552.

33. *Id.*

34. *Id.* at 2567.

35. *Id.*

36. *Id.* at 2567-68.

37. *Id.* at 2568.

38. *Id.* at 2583.

a percentage of CAGIT, COIT, and CEDIT from a county under certain circumstances.³⁹ The percentage to be withheld is determined by the DLGF.⁴⁰ The DLGF must give thirty days written notice to the auditor of state before any monies are withheld.⁴¹ The reasons for withholding distributions from counties relate to not providing the DLGF information in a timely and proper manner and failing to pay a bill for services related to services rendered by the DLGF.⁴²

The GA amended IC 6-1.1-35-1 to state that the DLGF shall “conduct operational audits of the offices of assessing officials” to make sure they are complying with statutory and regulatory assignments in an “effective, efficient, and productive manner.”⁴³

The GA amended IC 6-1.1-45-9 to provide that a person who makes a “qualified investment” at an enterprise zone location is only entitled to a deduction under the section if the deduction is approved by the local fiscal or legislative body in the unit.⁴⁴

The GA amended both IC 6-1.1-15-1⁴⁵ and IC 6-1.1-15-3⁴⁶ to provide that a taxpayer is not required to have an appraisal in order to initiate a review or prosecute the review of the assessment of the taxpayer’s tangible property.

IC 6-3.1-11-19, which was retroactive and took effect July 1, 2008, makes a technical change to the industrial recovery site tax credit repealing the language concerning the property tax credit for inventory.⁴⁷

Public Law 146-2008, section 828 provides an income tax deduction for property taxes paid in 2008 that would have been due in 2007, if the county had sent the bills out in a timely manner.⁴⁸ The amount of the deduction is the amount of property taxes paid in 2008, less any amount paid in 2007 for 2007 that were not due until 2008.⁴⁹

The GA amended IC 6-1.1-5.5-10 to state that a person commits a Class C felony if a person knowingly and intentionally “falsifies the value of transferred property” or “omits or falsifies any information required to be provided in the sales disclosure form.”⁵⁰

B. State Adjusted Gross Income Tax Statutory Provisions

Public Law 131-2008, section 62 provides that the provision to update the

39. *Id.* at 2583-84.

40. *Id.* at 2584.

41. *Id.* at 2585.

42. *Id.* at 2584-85

43. *Id.* at 2592.

44. *Id.* at 2615-16.

45. *Id.* at 3.

46. *Id.* at 4.

47. *Id.* at 2631-32.

48. *Id.* at 3093-94.

49. *Id.*

50. *Id.* at 2177.

Indiana Code to coincide with the IRC takes effect for taxable years beginning after December 31, 2007.⁵¹

Public Law 131-2008, section 63 provides that the definition of Indiana adjusted gross income contained in IC 6-3-1-3.5 takes effect for taxable years beginning after December 31, 2007.⁵²

Public Law 131-2008, section 77 provides that estimated tax payments computed by nonresident aliens allowing for one personal exemption, and employers withholding adjusted gross income tax from nonresident aliens allowing for one personal exemption when calculating the amount of tax to be withheld applies to taxable years beginning after December 31, 2008.⁵³

IC 6-3-1-3.5 provides that the federal tax rebate distributed in 2008 will not be considered adjusted gross income in Indiana.⁵⁴

IC 6-3-1-11 provides that the definition of Indiana adjusted gross income is amended to coincide with the federal definition used in the IRC.⁵⁵

IC 6-3-2-6 increases the renter's income tax deduction from \$2500 to \$3000.⁵⁶

IC 6-3-2-13 changes the reference to the port commission to the ports of Indiana within the maritime opportunity district tax deduction.⁵⁷

IC 6-3-3-12 provides that if a person makes a nonqualified withdrawal from a 529 savings account and is not required to file an annual Indiana income tax return, then the Department has the authority to issue a demand notice to the person. This section also provides that a withdrawal from the college choice 529 education savings plan transferred to another qualified tuition program is a nonqualified withdrawal.⁵⁸

IC 6-3-4-1.5 provides that a professional preparer is not required to file a return in an electronic format if the taxpayer requests in writing that the return not be filed electronically. After December 31, 2010, a professional preparer that does not comply with electronic filing procedures will be subject to a penalty of \$50 for each return not filed in an electronic format with a maximum penalty of \$25,000 per year.⁵⁹

Public Law 131-2008, section 80 provides that the amendments concerning the ability of a taxpayer to opt out of electronic filing when the return is completed by a professional preparer applies to returns filed after December 31, 2008.⁶⁰

IC 6-3-4-4.1 provides that an estimated tax payment made by a nonresident

51. *Id.* at 1997.

52. *Id.*

53. *Id.* at 2013.

54. *See id.* at 1930.

55. *Id.* at 1935-36.

56. *Id.* at 2627.

57. *Id.* at 1439-40.

58. *Id.* at 1936-38.

59. *Id.* at 1939.

60. *Id.* at 2014.

alien must be computed by applying only one personal exemption regardless of the total number of exemptions the person may claim on the taxpayer's annual return.⁶¹ IC 6-3-4-4.1 provides that an individual filing an estimated tax return must designate an amount that represents state adjusted gross income tax liability, and an amount that represents estimated local option income tax liability.⁶²

IC 6-3-4-8 provides that an employer withholding taxes for a nonresident alien is required to limit the number of exemptions claimed to one per employee.⁶³

IC 6-3-4-15.7 requires a person who requests withholding of adjusted gross income tax from an annuity, pension, or retirement plan to designate the amount that represents state adjusted gross income tax and the amount that represents local option income tax. The Department is required to adopt guidelines to assist taxpayers in making the required designations.⁶⁴

IC 6-3-4-16 provides that for individual income tax returns filed after December 31, 2010, the Department will implement a system of crosschecks between the employer W-2 forms and the individual taxpayer's W-2 forms.⁶⁵

IC 6-3-4-17 provides that after December 31, 2010, the Department and the Office of Management and Budget shall develop a quarterly report that summarizes the amount reported to and processed by the Department for individual estimated tax and monthly withholding by employers for each county.⁶⁶ The report shall be distributed to the county auditors within forty-five days after the end of the calendar quarter.⁶⁷

IC 6-3-7-3 provides that 100% of the individual income tax will be deposited in the state general fund.⁶⁸

IC 6-3.1-21-6 increases the earned income tax credit from 6% of the federal credit to 9% of the federal credit.⁶⁹ IC 6-3.1-21-6 also provides that a nonresident taxpayer claiming the earned income tax credit is required to apportion the amount of the credit on the same basis that Indiana income is apportioned.⁷⁰

IC 6-3.1-29-19 allows non-Indiana coal to be used in a coal gasification power plant if the taxpayer certifies to the IEDC that partial use of other coal will result in lower rates for Indiana retail utility customers.⁷¹

61. *Id.* at 1939-40.

62. *Id.*

63. *Id.* at 1942.

64. *Id.* at 2629-30.

65. *Id.* at 2630.

66. *Id.* at 2630-31.

67. *Id.* at 2631.

68. *Id.*

69. *Id.* at 2632.

70. *Id.* at 1946.

71. *Id.* at 1047.

IC 6-3.1-32 creates a media production expenditure income tax credit.⁷² A qualified media production includes a feature length film, music video, television series, digital media production, and an advertising message broadcast on television or radio.⁷³ The definition does not include television coverage of the news or an athletic event. Expenses that qualify for the credit include: salaries and wages to Indiana residents, costs for a story, costs for locations, sets, and wardrobes, editing costs, facility and equipment rental, food and lodging, and legal services.⁷⁴ Qualified expenses do not include payments of wages and salaries to a director, producer, screenwriter, or an actor unless the individual is a resident of Indiana.⁷⁵ Qualified expenditures that are at least \$100,000 for a movie or television series, or \$50,000 for any other type of media production are entitled to a refundable tax credit.⁷⁶ If the total qualified production expenditures are less than \$6,000,000 in a taxable year, then the income tax credit is 15% of the qualified expenditures.⁷⁷ If the total qualified production expenditures exceed \$6,000,000 in a taxable year, the amount of the credit is a percentage determined by the IEDC multiplied by the amount of qualified production expenditures in the taxable year. A taxpayer that is going to claim a credit must, before making the qualified production expenditures, apply to the IEDC for approval of the credit.⁷⁸ The maximum amount of tax credits that may be approved by the IEDC may not exceed \$5,000,000 in a taxable year for all taxpayers.⁷⁹ If the amount of the credit exceeds the taxpayer's tax liability for the taxable year, then the taxpayer is entitled to a refund of the excess.⁸⁰ A taxpayer receiving the credit must file a tax return for the first five years that the taxpayer has income from the qualified media production for which the tax credit was granted.⁸¹ Income from the qualified media production is apportioned to Indiana based on the income of the corporation multiplied by a percentage equal to the amount of qualified expenditures for which the tax credit was granted, divided by the total production expenditures for the qualified media production.⁸² The credit cannot be awarded for any taxable year beginning after December 31, 2011.⁸³

IC 6-3.1-32-9 provides that the media production income tax credit is limited to \$5,000,000 for all taxpayers in a state fiscal year.⁸⁴

72. *Id.* at 2-8.

73. *Id.* at 3.

74. *Id.*

75. *Id.* at 4.

76. *Id.*

77. *Id.*

78. *Id.* at 4-5.

79. *Id.* at 6.

80. *Id.*

81. *Id.*

82. *Id.* at 7.

83. *Id.*

84. *Id.* at 1946.

IC 6-3.1-32-11 provides that if a taxpayer has more than \$6,000,000 in qualified media production expenditures, then the IEDC is to determine the amount of credit that the taxpayer is eligible to claim within the \$5,000,000 limitation established for all taxpayers.⁸⁵

IC 6-3.1-32-13 provides that the maximum movie production tax credit that can be claimed for projects approved by the IEDC is eliminated because of the total limitation of \$5,000,000 for all projects.⁸⁶

Public Law 131-2008, section 81 provides that the increase in the earned income tax credit, and the penalty for an individual who fails to file a return even if no remittance is due, applies to taxable years beginning after December 31, 2008.⁸⁷

IC 6-8.1-10-5 provides that a person who makes a payment by credit card, debit card, or EFT where the payment is not honored when presented through normal banking channels, is subject to the same penalties as a taxpayer whose check payment is not honored by a financial institution.⁸⁸

IC 6-8.1-10-3.5 provides that if a person fails to file an individual income tax return where no remittance is due, the person is subject to a penalty of \$10 per day for each day the return is late, to a maximum of \$500.⁸⁹

C. County Adjusted Gross Income Tax Statutory Provisions

Public Law 1-2008, section 9 extends the deadlines for imposition of CAGIT to December 31, 2007, from the original deadline of August 1, 2007, depending on the date the ordinance is adopted if it is adopted after August 1, 2007.⁹⁰

IC 6-3.5-1.1-9 requires the budget agency to provide to a county council a summary of calculations concerning the amount of CAGIT reported on individual income tax returns processed by the Department during the previous fiscal year, adjustments for over distributions in prior years, adjustments for clerical or mathematical errors in prior years, adjustments for tax rate changes, and the amount of the excess account balances to be distributed.⁹¹

IC 6-3.5-7-18 requires employers to report the amount of county tax attributable to each county each time the employer remits the tax withheld.⁹²

IC 6-3.5-1.1-25 provides that if a county adopts a rate of 0.25% for levy relief and property tax replacement credits combined or singly, then the county can adopt a rate not to exceed 0.25% for public safety.⁹³

IC 6-3.5-1.1-26 authorizes Lake County to adopt CAGIT for property tax

85. *Id.* at 1946-47.

86. *Id.* at 1947.

87. *Id.* at 2014.

88. *Id.* at 1978.

89. *Id.* at 1977.

90. *Id.* at 12-13.

91. *Id.* at 2633-34.

92. *Id.* at 2688.

93. *Id.* at 2643.

levy reduction or property tax replacement credits.⁹⁴ The tax revenue can be distributed to a municipality based on the tax collected from the taxpayers located in the municipality and if it is collected from taxpayers in an unincorporated area, then the revenue shall be distributed to the unincorporated area of the county and used for property tax replacement credits.⁹⁵ The Lake County revenue can also be split so that 60% is used for property tax replacement credits and 40% is used for levy reduction.⁹⁶

IC 6-8.1-10-5 provides that a person who makes a payment by credit card, debit card, or EFT where the payment is not honored when presented through normal banking channels, the person is subject to the same penalties as a taxpayer whose check payment is not honored by a financial institution.⁹⁷

IC 6-8.1-10-3.5 provides that if a person fails to file an individual income tax return where no remittance is due, the person is subject to a penalty of \$10 per day for each day the return is late, to a maximum of \$500.⁹⁸

D. County Option Income Tax Statutory Provisions

Public Law 1-2008, section 9 extends the deadlines for imposition of COIT to December 31, 2007 from the original deadline of August 1, 2007, if the ordinance is adopted after August 1, 2007.⁹⁹

IC 6-3.5-6-17 requires the budget agency to provide a county council a summary of calculations concerning the amount of COIT reported on individual income tax returns processed by the Department during the previous fiscal year, adjustments for over distributions in prior years, adjustments for clerical or mathematical errors in prior years, adjustments for tax rate changes, and the amount of the excess account balances to be distributed.¹⁰⁰

IC 6-3.5-7-18 requires employers to report the amount of county tax attributable to each county each time the employer remits the tax withheld.¹⁰¹

IC 6-3.5-6-31 provides that if a county adopts a rate of 0.25% for levy relief and property tax replacement credits combined or singly, the county can adopt a rate not to exceed 0.25% for public safety.¹⁰²

IC 6-3.5-6-32 authorizes Lake County to adopt COIT for property tax levy reduction or property tax replacement credits. The tax revenue can be distributed to a municipality based on the tax collected from the taxpayers located in the municipality; and if it is collected from taxpayers in an unincorporated area, the revenue shall be distributed to the unincorporated area of the county and used for

94. *Id.* at 2647.

95. *Id.* at 2647-48.

96. *Id.* at 2648.

97. *Id.* at 1978.

98. *Id.* at 1977.

99. *Id.* at 12-13.

100. *Id.* at 2655-56.

101. *Id.* at 2688.

102. *Id.* at 2666.

property tax replacement credits. The Lake County revenue can also be split so that 60% is used for property tax replacement credits and 40% is used for levy reduction.¹⁰³

IC 6-8.1-10-5 provides that a person who makes a payment by credit card, debit card, or EFT where the payment is not honored when presented through normal banking channels, the person is subject to the same penalties as a taxpayer whose check payment is not honored by a financial institution.¹⁰⁴

IC 6-8.1-10-3.5 provides that if a person fails to file an individual income tax return where no remittance is due, the person is subject to a penalty of \$10 per day for each day the return is late, to a maximum of \$500.¹⁰⁵

E. Local Option Income Tax Statutory Provisions

Public Law 146-2008, section 846 extends the dates for adoption and implementation of LOIT rates in 2008 to be used for property tax relief, levy limits and public safety.¹⁰⁶ The following chart provides the dates for adoption and implementation of the tax rates:

ADOPTION	IMPLEMENTATION
Before Oct. 1, 2008	Oct. 1, 2008
Oct. 1 to Oct. 15, 2008	Nov. 1, 2008
Oct. 16 to Nov. 15, 2008	Dec. 1, 2008
Nov. 16 to Dec. 31, 2008	Jan. 1, 2009

IC 6-3.5-7-18 requires employers to report the amount of county tax attributable to each county each time the employer remits the tax withheld.¹⁰⁷

IC 6-3.5-6-31 provides that if a county adopts a rate of 0.25% for levy relief and property tax replacement credits combined or singly, the county can adopt a rate not to exceed 0.25% for public safety.¹⁰⁸

IC 6-8.1-10-5 provides that a person who makes a payment by credit card, debit card, or EFT where the payment is not honored when presented through normal banking channels, the person is subject to the same penalties as a taxpayer whose check payment is not honored by a financial institution.¹⁰⁹

IC 6-8.1-10-3.5 provides that if a person fails to file an individual income tax return where no remittance is due, the person is subject to a penalty of \$10 per day for each day the return is late, to a maximum of \$500.¹¹⁰

103. *Id.* at 2671-72.

104. *Id.* at 1978.

105. *Id.* at 1977.

106. *Id.* at 3101.

107. *Id.* at 2688.

108. *Id.* at 2666.

109. *Id.* at 1978.

110. *Id.* at 1977.

F. County Economic Development Income Tax Statutory Provisions

IC 6-3.5-7-11 requires the budget agency to provide to a county council a summary of calculations concerning the amount of CEDIT reported on individual income tax returns processed by the Department during the previous fiscal year, adjustments for over distributions in prior years, adjustments for clerical or mathematical errors in prior years, adjustments for tax rate changes, and the amount of the excess account balances to be distributed.¹¹¹

G. Utility Receipts Tax Statutory Provisions

The GA amended IC 6-2.3-3-5 to provide that the sale of natural gas to a generator of electricity for use by the purchaser in generating electricity for resale is exempt from the utility receipts tax and the utility services use tax.¹¹²

H. Sales And Use Tax Statutory Provisions

IC 6-2.5-1-16.2 defines digital audio works as the fixation of a series of musical, spoken, or other sounds, including ring tones.¹¹³

IC 6-2.5-1-16.3 defines digital audiovisual works as a series of related images that, when shown in succession, impart an impression of motion.¹¹⁴

IC 6-2.5-1-16.4 defines digital books as works that are generally recognized as books.¹¹⁵

IC 6-2.5-1-18 adds repair and replacement parts as components used in conjunction with durable medical equipment.¹¹⁶

IC 6-2.5-1-26.5 defines specified digital products as digital audio works, digital audio visual works, and digital books.¹¹⁷

IC 6-2.5-2-2 increases the sales tax rate from 6% to 7%, and lists the amount of tax to be collected for transactions that are less than \$1.07.¹¹⁸

IC 6-2.5-4-16 provides that when a person transfers specified digital products to an end user, the person is a retail merchant making a retail transaction that is subject to sales tax.¹¹⁹ An end user does not include a person who receives a product transferred electronically for further commercial broadcast, rebroadcast, transmission, retransmission, licensing distribution, or exhibition of a product to another person.¹²⁰ The section also provides that the sales tax only applies to the rental of an aircraft and not to the cost of flight instruction when a person rents

111. *Id.* at 2679.

112. *Id.* at 1923.

113. *Id.* at 928.

114. *Id.*

115. *Id.*

116. *Id.* at 929.

117. *Id.*

118. *Id.* at 2621.

119. *Id.* at 929.

120. *Id.*

an aircraft used in conjunction with flight instruction services.¹²¹

IC 6-2.5-5-41 amends the sales tax exemption for motion pictures to eliminate the definition of a motion picture and insert the term “qualified media production,” which includes a feature length film, television series, digital media production, audio recording or music video, or advertising message broadcast on radio or television. The definition does not include television coverage of the news or a sporting event. The amendment also provides that an expenditure is not eligible for the sales tax exemption if the expenditure qualifies for, and is used to claim, an income tax credit.¹²² IC 6-2.5-5-41 also provides that the sales tax exemption for media production expenditures is extended until December 31, 2011.¹²³

IC 6-2.5-5-43 provides that the sale of gambling games to taverns are exempt from the sales tax.¹²⁴

IC 6-2.5-6-1 provides that if a retail merchant’s annual sales tax liability is less than \$1,000, then the retail merchant is only required to file an annual return. A person who remits sales tax by electronic funds transfer is required to file a monthly return instead of a quarterly recap.¹²⁵

IC 6-2.5-6-7 requires a retail merchant to pay to the Department 7% of the retail merchant’s gross retail income.¹²⁶

IC 6-2.5-6-8 provides that a retail merchant’s income exclusion ratio is the total gross retail income from transactions that are less than \$.08 divided by the total gross retail income for the tax year from all retail transactions.¹²⁷

IC 6-2.5-6-10 states that for reporting periods beginning after June 30, 2008, the collection allowance is reduced to 0.73% if the annual sales tax liability is less than \$60,000; 0.53% if the annual sales tax liability is greater than \$60,000 and less than \$600,000; and 0.26% if the annual sales tax liability exceeds \$600,000.¹²⁸

IC 6-2.5-7-3 increases the sales tax rate to 7% when it is applied against the price of gasoline before the addition of state and federal taxes.¹²⁹

IC 6-2.5-7-5 provides that when a retail merchant reports the sales tax for the sales of gasoline, in order to determine the amount of sales tax to be reported, the retail merchant shall multiply the gross receipts by 6.54%.¹³⁰ Gross receipts includes the sales tax, but excludes state and federal gasoline and special fuel taxes.¹³¹

121. *Id.* at 1923.

122. *Id.* at 1924.

123. *Id.*

124. *Id.* at 1408.

125. *Id.* at 1924-26.

126. *Id.* at 2621.

127. *Id.* at 2621-22.

128. *Id.* at 2622.

129. *Id.* at 2622-23.

130. *Id.* at 2623-24.

131. *Id.*

IC 6-2.5-7-5.5 changes an internal reference to reflect a change due to a recodification of the statute concerning agricultural commodities.¹³²

IC 6-2.5-8-1 makes a technical change concerning reporting to the county assessor if there is no township assessor.¹³³

IC 6-2.5-10-1 changes the distribution of the sales tax to provide the following deposits of sales tax revenue: 99.178% to the general fund, 0.67% to the public mass transportation fund, 0.029% to the industrial rail service fund, and 0.123% to the commuter rail service fund.¹³⁴

IC 6-2.5-13-1 provides that until December 31, 2009, the sourcing of floral orders transmitted to another florist for delivery is sourced to the location of the florist that originally takes the floral order from the purchaser.¹³⁵

Public Law 131-2008, section 78 provides that for reporting periods beginning after December 31, 2008, a retail merchant whose annual sales tax liability that is less than \$1,000 is only required to file an annual return.¹³⁶

I. Recreational Vehicle Excise Tax Statutory Provisions

IC 6-6-5.1 creates an excise tax on recreational vehicles and truck campers. The excise tax replaces the personal property tax that the owner of the vehicle is required to pay.¹³⁷

IC 6-8.1-1-1 adds the RV excise tax as a listed tax.¹³⁸

IC 6-8.1-5-2 provides that if a person fails to pay the RV excise tax the person is considered to have failed to file a return for purposes of penalties imposed by the Department.¹³⁹

IC 6-8.1-7-1 provides that the Department can release information to the BMV concerning evasion of the RV excise tax if the information is used for enforcement and collection purposes. Confidential information may be revealed upon request from the chief law enforcement officer of a state or local law enforcement agency, when the information is to be kept confidential and used for official purposes.¹⁴⁰

IC 6-8.1-10-4 provides that if a person fails to pay the RV excise tax, the person commits a Class A misdemeanor.¹⁴¹

J. Cigarette Tax Statutory Provisions

IC 6-7-1-17 provides that a cigarette distributor must be current on all listed

132. *Id.* at 446.

133. *Id.* at 2626.

134. *Id.* at 2626-27.

135. *Id.* at 932.

136. *Id.* at 2013-14.

137. *Id.* at 1950.

138. *Id.* at 1970.

139. *Id.* at 1972.

140. *Id.* at 1975.

141. *Id.* at 1977-78.

taxes to have the distributor's license issued or renewed. If a distributor is purchasing cigarette stamps on credit, then the payment shall be made by electronic funds transfer.¹⁴²

IC 22-14-7-0.5 to -31 provides that beginning July 2009 all cigarettes must be tested and certified for fire safety.¹⁴³ The Department may inspect markings on the cigarette packaging to ensure that they have been tested and certified for fire safety.¹⁴⁴ Cigarettes that are sold or offered for sale that do not comply with the performance measures are subject to forfeiture.¹⁴⁵ Cigarettes that are seized by a law enforcement officer or the state fire marshal shall be turned over to the Department to be destroyed.¹⁴⁶

K. Miscellaneous Tax Statutory Provisions and Other Tax Statutory Provisions

IC 6-8-12-1 provides that the NCAA is added to the NFL as an eligible entity to receive tax incentives if Indianapolis hosts a qualified event.¹⁴⁷

IC 6-8-12-2 provides that the Men's or Women's Final Four are added to the Super Bowl as eligible qualified events for which the state will provide tax incentives.¹⁴⁸

IC 6-8-12-3 provides that salaries and wages paid to employees of the NCAA that are normally subject to adjusted gross income tax will continue to be subject to adjusted gross income tax, even if the salaries and wages are paid in connection with an NCAA Final Four event.¹⁴⁹

IC 6-9-40 authorizes Steuben County to adopt an ordinance to impose a 1% food and beverage tax. The tax is effective after the last day of the month that succeeds the month in which the ordinance was adopted. One half of the revenue will be distributed to the city of Angola and the remainder is to be used by the county. The revenue from the tax can be used for infrastructure improvements, park and recreation improvements, police and law enforcement purposes, and bond obligations for any infrastructure improvements.¹⁵⁰

IC 4-35-8-3 provides that the tax revenue from the slot machines at horse race tracks is to be deposited in the state general fund instead of in the property tax reduction trust fund, which has been eliminated.¹⁵¹

IC 4-36-1-1 to -9-7 authorizes taverns to sell pull tabs, tip boards,

142. *Id.* at 1969.

143. *Id.* at 1192.

144. *Id.* at 1200.

145. *Id.* at 1199-1200.

146. *Id.* at 1199.

147. *Id.* at 1969.

148. *Id.*

149. *Id.* at 1970.

150. *Id.* at 1415-18.

151. *Id.* at 2339.

punchboards, and conduct raffles.¹⁵² Taverns, manufacturers, and distributors are required to be licensed by the alcohol and tobacco commission before they can conduct gaming or sell gaming equipment.¹⁵³ Applicants for a license must receive a tax clearance from the Department and may not be on the most recent tax warrant list.¹⁵⁴ An excise tax is imposed on the distribution of gambling games in the amount of 10% of the price paid by the retailer that purchases the games.¹⁵⁵ The entity distributing the pull tabs, punchboards, or tip boards is liable for the tax.¹⁵⁶ The Department will establish procedures for the distributor to account for the amount of tax collected, the number of games sold, the receipts for the sale of the games, and the address of each retailer that purchased games from the distributor in the previous calendar month.¹⁵⁷ All taxes are required to be remitted on a monthly basis.¹⁵⁸ The Department shall prescribe the forms and reports required to be filed and the contents of the reports.¹⁵⁹ The Department is authorized to audit a licensee at any time.¹⁶⁰ The Department shall deposit all taxes in the general fund.¹⁶¹

IC 6-8.1-1-1 provides that the type II gambling game excise tax is a listed tax.¹⁶²

L. Other Tax Administration Statutory Provisions

IC 6-8.1-1-1 repeals the reference to the municipal option income tax in the listed taxes.¹⁶³

IC 6-8.1-7-1 changes a reference from the county office of family and children to the local office of the division of family resources.¹⁶⁴

IC 6-8.1-8-8.7 provides that any person acting on behalf of the Department is not liable for any action taken in good faith to collect the Department's levy unless the action is contrary to the Department's direction, or the person acts with deliberate ignorance or disregard of the truth.¹⁶⁵

IC 6-8.1-9-1 changes a reference to an internal code cite.¹⁶⁶

152. *Id.* at 1394-1408.

153. *Id.* at 1397.

154. *Id.* at 1398-99.

155. *Id.* at 1399-1400.

156. *Id.*

157. *Id.* at 1408.

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.* at 1408-09.

163. *Id.* at 2712.

164. *Id.* at 2714.

165. *Id.* at 2112.

166. *Id.* at 1977.

II. INDIANA TAX COURT OPINIONS AND DECISIONS

The Indiana Tax Court published fifteen opinions and decisions during 2008. Four of the cases dealt with the sales and use taxes, four cases dealt with the income taxes, two cases dealt with the property taxes, two cases dealt with the inheritance tax, two cases dealt with state and local governments, and one case dealt with the financial institutions tax.

A. Sales and Use Tax Cases

1. *Brambles Industries, Inc. v. Indiana Department of State Revenue*.¹⁶⁷—In *Brambles*, the Tax Court was presented with the question of whether a manufacturers' lease payment to the Petitioner were exempt from Indiana's sales tax under either the sale for resale exemption or the nonreturnable container exemption.¹⁶⁸ The Petitioners also contended that taxing the lease payments in question violated the Equal Protection Clause of the federal constitution and the Privileges and Immunities Clause of the state constitution.¹⁶⁹

Brambles Industries (Chep) filed claims for refund of the Indiana sales tax on behalf of numerous manufacturers who leased pallets from Chep.¹⁷⁰ The manufacturers paid state sales tax on those lease payments.¹⁷¹ The manufacturers authorized Chep to seek refunds on the lease payments, and Chep, in turn, agreed to distribute any refund to the manufacturers.¹⁷²

The Tax Court explained how the leasing transactions were structured:

During the years at issue, the manufacturers leased shipping pallets from Chep. Pursuant to their lease agreements, the manufacturers could only use the pallets to ship their products to those retailers who had separate agreements with Chep for the return of the pallets. When the manufacturers shipped their products to those retailers, they were required to notify Chep as to the quantity and location of the pallets.¹⁷³

Pursuant to IC 6-2.5-2-1, the Indiana sales tax was imposed on the above referenced transaction.¹⁷⁴ The Tax Court found that "[t]here is no dispute here that the manufacturers' leasing of pallets from Chep is a retail transaction."¹⁷⁵ However, the manufacturers claimed that two Indiana exemptions from the state sales tax were applicable to their transactions.¹⁷⁶

a. *Sale for resale exemption*.—Indiana law exempts certain transactions

167. 892 N.E.2d 1287 (Ind. Tax Ct. 2008).

168. *Id.* at 1288.

169. *Id.*

170. *Id.* at 1289.

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.* (citing IND. CODE § 6-2.5-4-10(a) (2006)).

176. *Id.*

involving tangible property from the state's sales tax "if the person acquiring the property acquires it for resale, rental, or leasing in the ordinary course of the person's business."¹⁷⁷ Additionally, "in order to show entitlement to the sale for resale exemption, the taxpayer must demonstrate that it received itemized consideration for the item."¹⁷⁸ The Tax Court noted that, "separate bargaining must occur between the customer and the taxpayer for the exchange of that particular item."¹⁷⁹ Because the Petitioner did not meet its burden of proving the elements of the exemption (specifically that the manufacturers received itemized consideration for the pallets), the Tax Court stated that the lease transactions did not qualify for the sale for resale exemption.¹⁸⁰

b. Nonreturnable container exemption.—Indiana law exempts from the state sales tax "[s]ales of . . . empty containers . . . if the person acquiring the . . . containers acquires them for use as nonreturnable packages for selling the contents the he adds."¹⁸¹ The Department argued in *Brambles* that the containers were "returnable" and thus not subject to the exemption.¹⁸² Petitioner argued that the containers should be treated as "nonreturnable" because they were not returned to the manufacturers—but instead to Chep.¹⁸³ Therefore, the Tax Court needed to determine to whom containers must be returned in order to qualify for the exemption.¹⁸⁴

The Tax Court explained that neither Indiana's definition of "return," nor the dictionary definition required "that the container go back to the person from whom it was immediately acquired in order to be considered 'returned.'"¹⁸⁵ The Tax Court stated that it was enough that the pallets were returned to an earlier possessor (in this case Chep) in order to be classified as "returnable" rather than "nonreturnable."¹⁸⁶ Because the pallets were returned to an earlier possessor, the Tax Court held that the leasing transactions did not qualify for the nonreturnable container exemption.¹⁸⁷

c. Constitutional argument.—The manufacturers argued that there "would be a possible equal protection problem" under the federal and state constitution if the Department denied the sale for resale exemption claim, "on the basis that no resale occurred because title and ownership of the pallets remained with Chep

177. *Id.* (citing IND. CODE § 6-2.5-5-8(b) (2006)).

178. *Id.* at 1290 (citing *Miles, Inc. v. Ind. Dep't of State Revenue*, 659 N.E.2d 1158, 1165 (Ind. Tax Ct. 1995)).

179. *Id.* (citing *Miles*, 659 N.E.2d at 1165); see also *Greensburg Motel Assocs. v. Ind. Dep't of State Revenue*, 629 N.E.2d 1302, 1305-06 (Ind. Tax Ct. 1994).

180. *Brambles*, 892 N.E.2d at 1290.

181. IND. CODE § 6-2.5-5-9(d) (2006).

182. *Brambles*, 892 N.E.2d at 1290.

183. *Id.*

184. *Id.*

185. *Id.* at 1291.

186. *Id.*

187. *Id.*

at all times.”¹⁸⁸ However, the sale for resale exemption was denied on a different, non-constitutional basis. Therefore, the Tax Court determined that the constitutional argument set forth by Petitioner failed.¹⁸⁹

2. *SAC Finance, Inc. v. Indiana Department of State Revenue*.¹⁹⁰—In *SAC Finance*, the Tax Court addressed whether a finance company was entitled to a bad-debt deduction through IC 6-2.5-6-9 with respect to the installment contracts the finance company purchased from a used car dealership.¹⁹¹

Superior Auto, a used car dealership, sold vehicles in Fort Wayne, Indiana.¹⁹² When individuals purchased vehicles from Superior Auto, the transaction was usually financed through an installment contract.¹⁹³ The installment contract would include both the price of the vehicle and the amount of state sales tax imposed on the transaction.¹⁹⁴ SAC bought installment contracts from Superior Auto.¹⁹⁵ Superior Auto assigned its rights and interests in the installment contracts to SAC in exchange for 70% of the balance of the contracts.¹⁹⁶ After some of the vehicle purchasers defaulted on their contracts, SAC filed a refund claim with the Department for the sales tax that had already been remitted on the uncollectible accounts.¹⁹⁷

The Department allowed a refund, but only allowed 70% of the amount requested.¹⁹⁸ “[T]he Department denied the other 30% of the claim on the basis that it represented the ‘discount’ SAC received when it purchased the installment contracts.”¹⁹⁹

After agreeing that SAC was entitled to a refund, the Tax Court was presented the question: what amount of refund was proper?²⁰⁰ The answer depended on how much SAC was allowed to write off as uncollectible debt for federal tax purposes.²⁰¹ The Tax Court ultimately held that SAC could not write off more than what it paid for the installment contracts.²⁰² In reaching its conclusion, the Tax Court looked to section 166 of the IRC and Treasury Regulation section 1.166-1(d).²⁰³ The Tax Court found the following language

188. *Id.*

189. *Id.*

190. 894 N.E.2d 1116 (Ind. Tax Ct. 2008), *trans. denied*.

191. *Id.* at 1117.

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.* at 1118.

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.* at 1119 (citing *Ind. Dep’t of Revenue v. 1 Stop Auto Sales, Inc.*, 810 N.E.2d 686, 690 (Ind. 2004)).

202. *Id.* at 1121.

203. *Id.* at 1119.

instructive: "A purchaser of accounts receivable which become worthless during the taxable year shall be entitled under section 166 to a deduction which is based upon the price he paid for such receivables but not upon their face value."²⁰⁴

Thus, the Tax Court affirmed the decision of the Department and held that SAC was only entitled to a refund in the amount it actually paid for the installment contracts.²⁰⁵

3. *Home Depot U.S.A., Inc. v. Indiana Department of State Revenue.*²⁰⁶—In *Home Depot*, the Tax Court was presented with the question of whether Home Depot, a national home improvement retailer, was entitled to a refund of the sales tax which Home Depot remitted on purchases made by customers who used private label credit cards at the retailer's stores, but then defaulted on their accounts with the finance companies who owned and operated the private label credit card program.²⁰⁷

Home Depot sought to claim a bad debt deduction for the accounts that its financing companies were unable to collect.²⁰⁸ At issue in the case were the structured agreements between Home Depot and its financing companies. Pursuant to the terms of the contracts, Home Depot made private label credit card applications available to customers in its stores.²⁰⁹ Home Depot then submitted the completed application forms to the financing companies, which processed the applications and issued credit cards to approved applicants.²¹⁰ The financing companies agreed to be responsible for all servicing of the credit cards, including billing and collection.²¹¹ Perhaps the most important term of the agreements stated: "All credit losses on Accounts shall be solely borne at the expense of [the finance companies] and shall not be passed on to [Home Depot]."²¹²

"With respect to the . . . credit card accounts that had been defaulted upon and were therefore uncollectible, the finance companies claimed 'bad debt' deductions on their federal income tax returns, pursuant to section 166 of the [IRC]."²¹³ On its federal income tax return, Home Depot deducted the service fees it paid to the financing companies attributable to accounts the financing companies were unable to collect.²¹⁴ Home Depot deducted the service fees as a business expense under section 162 of the IRC.²¹⁵

Home Depot filed a claim with the Department seeking a refund of the sales tax which Home Depot had remitted during the period at issue on purchases

204. *Id.* at 1120 (citing Treas. Reg. § 1.166-1(d)(2)(i)(b) (2006)).

205. *Id.* at 1121.

206. 891 N.E.2d 187 (Ind. Tax. Ct. 2008), *trans. denied*.

207. *Id.* at 187-88.

208. *Id.* at 189.

209. *Id.* at 188.

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.* at 188-89.

214. *Id.* at 189.

215. *Id.*

made by customers who used their private label credit cards but then defaulted with the finance companies.²¹⁶ The Department denied the refund claim because the finance companies, not Home Depot, claimed the bad debt deduction on the federal returns.²¹⁷ In upholding the Department's decision, the Tax Court stated: "[W]hen a retail merchant computes its bad debt deduction under Indiana Code § 6-2.5-6-9, it is limited to deducting that portion of the amount of its receivables equal to the amount actually written off for federal income tax purposes."²¹⁸

Because Home Depot had not claimed a bad debt deduction through section 166 on its federal income tax return, Home Depot was not entitled to a bad debt deduction through IC 6-2.5-6-9.²¹⁹

4. *Allied Collection Service, Inc. v. Indiana Department of State Revenue*.²²⁰—In *Allied*, the question before the Tax Court was whether Allied was involved in a retail unitary transaction subject to the use tax when it purchased collection letters from an out-of-state vendor.²²¹ The matter was before the Tax Court on the parties cross-motions for summary judgment.²²²

Allied, a licensed collection agency, is located in Columbus, Indiana.²²³ For the taxable years at dispute, Allied was hired by several healthcare providers to collect on patients' delinquent accounts.²²⁴ To facilitate collection, Allied employed Dantom Systems, Inc. (Dantom). Dantom, which was located in Livonia, Michigan, produced debt collection letters for Allied.²²⁵ These letters complied with federal and state compliance standards because they provided clear notice that they were from a debt collector.²²⁶ The Allied/Dantom agreement set forth the following arrangement:

Allied electronically transmitted to Dantom collection letter templates and databases of accounts receivable information (i.e., names, addresses, amounts due, etc.). In turn, Dantom processed the information and incorporated it into the letter templates. Dantom then printed the letters, placed them in the addressed envelopes with pre-addressed reply envelopes, affixed postage, and mailed the letters.²²⁷

Allied was billed by Dantom on a monthly basis.²²⁸ The monthly bills included

216. *Id.*

217. *Id.*

218. *Id.* at 191 (citing *Ind. Dep't of Revenue v. 1 Stop Auto Sales, Inc.*, 810 N.E.2d 686, 690 (Ind. 2004)).

219. *Id.*

220. 899 N.E.2d 69 (Ind. Tax Ct. 2008).

221. *Id.* at 70.

222. *Id.* at 71.

223. *Id.* at 70.

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.*

a single charge which was reached after using a formula based on the total number of letters printed by Dantom.²²⁹

The Department determined that Allied should have paid use tax when Allied purchased the letters from Dantom.²³⁰ Specifically, the Department concluded that Allied was responsible on the entire amount of the use tax arising from the sale of the letters.²³¹ Although, Dantom sold Allied both the letters and a service, the monthly bills sent to Allied did not separate the charges for each.²³² It was the Department's position that the sales of the letters were "retail unitary transactions" and subject to use tax assessment in their entirety.²³³ As a consequence, the Department issued a use tax assessment of \$7,180.77.²³⁴ Allied appealed the Department's findings and the Tax Court heard arguments on the parties' cross-motions for summary judgment.²³⁵

When it was before the Tax Court, Allied did not dispute that its transactions with Dantom were "retail unitary transactions."²³⁶ Under Indiana law: "A unitary transaction is a transaction that 'includes all items of personal property and services which are furnished under a single order or agreement and for which a total *combined* charge or price is calculated.'"²³⁷

Instead, Allied claimed that the services rendered in the transactions were not taxable.²³⁸ The Tax Court, however, explained the general rule that "services rendered in retail unitary transactions are taxable *only if* the transfer of property and the rendition of services are inextricable and indivisible."²³⁹ The Tax Court further stated: "[I]f services are performed before the property is transferred, the transaction is inextricable and wholly subject to the tax. In contrast, if the services are provided after the property is transferred, the transaction is divisible, meaning that the sale of property is taxed but not the services."²⁴⁰ In *Allied*, however, the Tax Court determined that the transfer of property and services rendered were concurrent.²⁴¹ Therefore, the Tax Court looked to other factors such as Dantom's business records, the nature of Dantom's business, and the nature of the specific transactions to determine whether the transactions were divisible.²⁴²

Allied claimed that it was entitled to summary judgment because the services

229. *Id.*

230. *Id.* at 71.

231. *Id.*

232. *Id.*

233. *Id.*

234. *Id.*

235. *Id.*

236. *Id.* at 72.

237. *Id.* (quoting IND. CODE § 6-2.5-1-1(a) (2006)).

238. *Id.*

239. *Id.*

240. *Id.* (citations omitted).

241. *Id.*

242. *Id.* at 72-73.

rendered in the subject transactions were divisible.²⁴³ To support its contention, Allied argued that Dantom's overall business structure was aimed at providing services.²⁴⁴ The Tax Court found that none of the evidence established that the transactions were divisible.²⁴⁵

The Department claimed it was entitled to summary judgment because its designated evidence showed that the subject transactions involved tangible property and services which were inextricable and indivisible.²⁴⁶ The Tax Court found that like Allied's designated evidence, the Department's evidence failed to establish whether the subject transactions were divisible.²⁴⁷

Because the Tax Court determined that neither party established whether the subject transactions were inextricable and indivisible, the Tax Court held that a schedule for pre-trial matters would be issued in a separate order.²⁴⁸

B. Income Tax Cases

1. *Wiles v. Indiana Department of State Revenue*.²⁴⁹—In *Wiles*, the issue before the Tax Court was whether the Petitioner's claim for a refund was barred by their agreement with the Department through Indiana's Tax Amnesty Program (Amnesty Program).²⁵⁰

In 2005, the Department issued six Notices of Proposed Assessment (Proposed Assessments) to Megan Wiles in her capacity as Chairman of the Board of Inter-Cultural Services of Hamilton County, Inc. (ICS).²⁵¹ The Department's Proposed Assessments were based on a reasonable belief that ICS had not withheld the proper amount of state and local income tax from its employee's wage payments.²⁵² After the Department's Proposed Assessments, totaling \$2,250 (excluding penalties and interest), went unpaid, even after the Department issued Demand Notices and Warrants of Collection of Tax to ICS, Megan Wiles paid ICS's tax liability under an agreement pursuant to the Amnesty Program.²⁵³ The liability was paid from a joint account of Greg and

243. *Id.* at 73.

244. *Id.* Allied supported its motion for summary judgment with (1) an affidavit from Allied's general manager, (2) a copy of the proposed assessments for the taxable years at issue, (3) a copy of the Allied/Dantom agreement, and (4) a copy of a letter from Dantom's CEO to Allied's general manager. *Id.*

245. *Id.* at 73-74. The letter from Dantom's CEO was inadmissible hearsay that lacked trustworthiness and the other documents were both conclusory and self-serving. *Id.*

246. *Id.* at 74.

247. *Id.* at 75.

248. *Id.*

249. 881 N.E.2d 105 (Ind. Tax Ct. 2008).

250. *Id.*

251. *Id.* at 105-06.

252. *Id.* at 106.

253. *Id.*

Megan Wiles.²⁵⁴ Citing the terms of the Amnesty Program, the Department denied the Wiles' claim for refund of tax filed in 2006.²⁵⁵

Indiana's general assembly adopted the Amnesty Program in 2005.²⁵⁶ The program allowed taxpayers with delinquent tax liabilities to pay their overdue taxes to the Department without interest, costs or other penalties associated with the delinquent tax.²⁵⁷ In exchange, taxpayers agreed to waive their right to protest the assessment or file a refund claim with the Department.²⁵⁸

Mr. and Mrs. Wiles argued that a refund was proper, despite the terms of the Amnesty Program, because ICS had no paid employees during the taxable period in which the Department assessed a withholding obligation.²⁵⁹ The Wiles claimed that the Amnesty agreement should be rescinded because both they and the Department made a "mutual mistake of fact" with respect to any withholding obligation ICS incurred for the taxable period at issue.²⁶⁰

The Tax Court disagreed with the Wiles.²⁶¹ The Tax Court found that when Megan Wiles "voluntarily paid ICS' tax liability under the Amnesty Program, she agreed to be bound by the terms of the agreement, which provided, inter alia, that she would not file a claim for refund of the tax paid."²⁶²

2. *Riverboat Development, Inc., v. Indiana Department of State Revenue.*²⁶³—In *RDI*, the Tax Court decided that a Kentucky S-corporation, which owned a minority membership interest in an Indiana corporation, was not subject to Indiana's withholding requirements through IC 6-3-4-13(a).²⁶⁴

Riverboat Development, Inc. (RDI) was a "Kentucky S-corporation with its principal place of business in Louisville, Kentucky."²⁶⁵ For the taxable years at issue, "RDI owned a minority membership interest in RDI/Caesars Riverboat Casino LLC (Caesars), an Indiana corporation that owned and operated a riverboat gambling casino and hotel resort in Elizabeth, Indiana."²⁶⁶ RDI did not conduct any business in Indiana, and had no ties to Indiana other than its membership interest in Caesars.²⁶⁷

For the taxable years in question, "Caesars was treated as a partnership for federal and state income tax purposes."²⁶⁸ As a partnership, Caesars' income,

254. *Id.*

255. *Id.*

256. *Id.*

257. *Id.*

258. *Id.*

259. *Id.*

260. *Id.* at 107.

261. *Id.*

262. *Id.*

263. 881 N.E.2d 107 (Ind. Tax Ct.), *trans. denied*, 898 N.E.2d 1220 (Ind. 2008).

264. *Id.* at 108.

265. *Id.*

266. *Id.*

267. *Id.*

268. *Id.*

losses, deductions, and credits were passed through and taxed to its individual members.²⁶⁹ As an S-corporation, RDI's income, losses, deductions, and credits were also passed-through and taxed to its individual members.²⁷⁰

The Department contended that RDI was subject to Indiana's withholding requirements because it had derived income from an Indiana source, specifically from the Caesars riverboat and hotel in Elizabeth, Indiana.²⁷¹ The Department contended that RDI should have withheld \$2.3 million in taxes from its shareholders based on the income derived from the riverboat and hotel.²⁷² RDI argued that its income was derived from an intangible source—its membership interest in Caesars.²⁷³ Income derived from an intangible source is only subject to Indiana taxation if the taxpayer is commercially domiciled in Indiana.²⁷⁴ The Tax Court determined that RDI, “is clearly not commercially domiciled in Indiana.”²⁷⁵ Therefore, because the only contact RDI had with Indiana was its ownership interest in Caesars, the specific question before the Tax Court was whether RDI's ownership interests were personal property, derived from sources within Indiana.²⁷⁶

The Tax Court concluded that RDI's ownership interests were an intangible income source and were not subject to the withholding requirements of IC 6-3-4-13(a).²⁷⁷ The Tax Court noted that IC 23-18-1-10 defined a “membership interest in a limited liability company as ‘a member's economic rights in the limited liability company.’”²⁷⁸ The Tax Court further noted that IC 23-18-6-2, defined the interest of a member in a limited liability company as “personal property.”²⁷⁹ More specifically, however, the Tax Court noted that the membership interest was “intangible personal property”²⁸⁰ because they lacked “a physical existence” and could not be “seen, weighed, measured, felt, or touched.”²⁸¹ Because RDI's income was derived from an intangible source, and RDI was not commercially domiciled in Indiana, RDI's income from its membership interests in Caesars was not subject to IC 6-3-4-13(a).²⁸²

3. *Lacey v. Indiana Department of State Revenue*.²⁸³—In *Lacey*, the Indiana

269. *Id.*

270. *Id.* at 109 n.4.

271. *Id.* at 109.

272. *Id.*

273. *Id.* at 109-10.

274. *Id.* at 110

275. *Id.* at 111

276. *Id.* at 110.

277. *Id.* at 110-11.

278. *Id.* at 110 (quoting IND. CODE § 23-18-1-10 (2007 & Supp. 2008)).

279. *Id.* (citing IND. CODE § 23-18-6-2 (2007 & Supp. 2008)).

280. *Id.* at 110-11 (citing *Rhoades v. Ind. Dep't of State Revenue*, 774 N.E.2d 1044, 1048 (Ind. Tax Ct. 2002)).

281. *Id.* at 111 (citations omitted).

282. *Id.*

283. 894 N.E.2d 113 (Ind. Tax Ct. 2008), *trans. denied*.

Tax Court was presented with the question of whether the compensation that Lacey received from his private employer was subject to income taxation.²⁸⁴

During the taxable year at issue, Lacey was employed by, and received compensation from, Adecco.²⁸⁵ Adecco issued a W-2 reporting Lacey's wages and withholding.²⁸⁶ Lacey argued that Adecco did not understand the concept of income taxation through the IRC.²⁸⁷ As an Indiana resident, Lacey filed an Indiana income tax return, but reported negative income and sought a refund of the state and county taxes withheld by his employer.²⁸⁸ The Department denied Lacey's claim for refund and notified him that he owed \$577.65 in state income tax.²⁸⁹

Under the state constitution, the Tax Court explained, "[t]he general assembly may levy and collect a tax upon income, from whatever source derived, at such rates, in such manner, and with such exemptions as may be prescribed by law."²⁹⁰ Under its constitutional authority, the general assembly enacted the Adjusted Gross Income Tax Act of 1963 (Act).²⁹¹ The Act defines "adjusted gross income" as the IRC has defined the term in Section 62.²⁹² Under Section 62, the Tax Court explained, "'adjusted gross income' is . . . gross income minus . . . [certain] deductions."²⁹³ The Act additionally incorporates the IRC's definition of "gross income" set forth at IRC Section 61: "'[G]ross income is all income from whatever source derived, including (but not limited to) . . . compensation for services."²⁹⁴

Lacey specifically argued that his compensation from Adecco was not subject to taxation because it was not wages or taxable income.²⁹⁵ Lacey's logic for the proposition that his compensation was not "wages" was:

- (1) the computation of adjusted gross income is based on the definition of wages found in sections 3121 and 3401 of the Internal Revenue Code;
- (2) these sections, however, apply only to privileged workers, i.e. individuals who either receive benefits from the federal government, or who live in federal territories or possessions;
- (3) Lacey is not a privileged worker because he works in the private sector;

284. *Id.* at 1114.

285. *Id.* at 1113.

286. *Id.*

287. *Id.*

288. *Id.*

289. *Id.* at 1113-14.

290. *Id.* at 1114 (quoting IND. CONST. art. 10, § 8).

291. *Id.*; see also IND. CODE § 6-3-1-1 to -33 (2006).

292. *Lacey*, 894 N.E.2d at 1114.

293. *Id.* (quoting I.R.C. § 62 (2006)).

294. *Id.* (quoting I.R.C. § 61 (2006)).

295. *Id.*

- (4) The compensation Lacey received therefore does not constitute wages subject to taxation.²⁹⁶

Lacey's logic to support the proposition that his compensation was not "income" consisted of the following:

- (1) a person's labor is an individually property right;
- (2) the income tax is an "excise tax [based] upon the conduct of businesses in a corporate capacity";
- (3) for purposes of taxation, individuals are not corporations;
- (4) individuals cannot have profit or gain when they exchange their labor for compensation, rather the exchange represents the fair market value of the individual's labor;
- (5) to be subject to taxation, income must be evidenced by a gain or profit;
- (6) Lacey, as an individual employed in the private sector, does not have income subject to taxation.²⁹⁷

The matter was before the Tax Court on the Department's motion for judgment on the pleadings and Lacey's motion to reconsider.²⁹⁸ In its motion the Department argued that there were no genuine issues of material fact before the Tax Court and that Lacey could not succeed under the facts and allegations set forth in his motion to reconsider.²⁹⁹ In granting the Department's motion and denying Lacey's, the Tax Court stated:

Federal courts have repeatedly, albeit implicitly, rejected the argument that wages as defined in sections 3121 and 3401 of the Internal Revenue Code can only be earned by those workers who have received a federal "privilege." Likewise, numerous federal courts have also rejected the claim that "money received in compensation for labor is not taxable[.]" Thus, both of Lacey's claims are incorrect as a matter of law.³⁰⁰

Therefore, the Tax Court held that Lacey's wages were subject to Indiana's income tax.³⁰¹

4. *U-Haul Co. of Indiana v. Indiana Department of State Revenue*.³⁰²—In *U-Haul*, the Tax Court was presented with the questions of whether the Department timely mailed its proposed assessment of the additional gross income tax owed by U-Haul and whether the Department's retroactive imposition of income tax was proper.³⁰³

296. *Id.*

297. *Id.* at 1114-15.

298. *Id.* at 1113-14.

299. *Id.*

300. *Id.* at 1115 (citations omitted).

301. *Id.* at 1116.

302. 896 N.E.2d 1253 (Ind. Tax Ct. 2008).

303. *Id.* at 1254.

"The U-Haul Rental System (U-Haul System), rents assorting moving equipment to the public for use throughout the United States and Canada."³⁰⁴ U-Haul System is composed of: "(1) Fleet Owners, (2) Rental Companies, (3) Rental Dealers, and (4) U-Haul International (UHI)."³⁰⁵ U-Haul System's four groups were bound together by contractual relationships, with UHI controlling the terms and conditions of each.³⁰⁶

U-Haul Indiana is an Indiana corporation that serves as a Rental Company with U-Haul System.³⁰⁷ "The Rental Companies merchandise and supervise the maintenance and repair of the rental equipment. The Rental Companies are responsible for establishing and servicing Rental Dealers for the U-Haul System[, and] . . . [t]he Rental Companies receive a percentage of the gross rental income collected by Rental Dealers located in their territories."³⁰⁸ For the taxable years at issue, U-Haul Indiana filed a timely consolidated gross income tax return with U-Haul Leasing and Sales Company (U-Haul Leasing).³⁰⁹ Based upon a Letter of Findings issued by the Department in March 1986, U-Haul Indiana's return reported that U-Haul Leasing's gross income tax liability was zero.³¹⁰

After an audit of U-Haul Indiana, the Department concluded that U-Haul Leasing owed income tax for the taxable years at issue.³¹¹ The Department then assessed U-Haul Indiana with additional gross income tax liabilities for 1999, 2000, and 2001.³¹² In April 2003, U-Haul Indiana protested the assessments, but in February 2006, the Department issued a Letter of Findings affirming the assessments for the taxable years at issue.³¹³ In March 2006 U-Haul Indiana filed an original tax appeal.³¹⁴ The matter was heard before the Tax Court on both U-Haul's and the Department's motions for summary judgment.³¹⁵ The issues before the Tax Court were: "[(1)] Whether the Department timely mailed its proposed assessment to U-Haul Indiana for the year ending March 31, 1999 (the 1999 tax year); and [(2)] Whether the Department's retroactive imposition of gross income tax, based on its admitted change in interpretation of tax, was proper."³¹⁶

a. The 1999 proposed assessment.—The Tax Court noted, that for the 1999 tax year, there was a three-year statute of limitations for the Department to issue a proposed assessment beginning, "after the latest of the date the return is filed[]

304. *Id.*

305. *Id.*

306. *Id.*

307. *Id.* at 1255.

308. *Id.* at 1254.

309. *Id.* at 1255.

310. *Id.*

311. *Id.*

312. *Id.* at 1255 n.3.

313. *Id.* at 1255.

314. *Id.*

315. *Id.*

316. *Id.* at 1254.

or . . . the due date of the return.”³¹⁷ The parties agreed that U-Haul Indiana filed its 1999 tax return on or before January 15, 2000.³¹⁸ Therefore, the Tax Court noted, the Department was required to send its proposed assessment with respect to U-Haul’s additional tax liability on or before January 15, 2003.³¹⁹

U-Haul Indiana claimed that it had “neither received, nor was aware of, the 1999 proposed assessment until it was ‘furnished’ with a copy of that assessment in August 2005.”³²⁰ The Tax Court explained that the affidavit created a rebuttable presumption as to the Department’s non-mailing of the 1999 proposed assessment.³²¹ The Tax Court found, however, that the Department’s designated evidence with respect to its “conformance with its routine business practices” rebutted the presumption of non-mailing.³²²

To rebut the presumption of non-mailing, the Department submitted the depositions of three Department employees “who were directly involved with the processing of U-Haul Indiana’s 1999 proposed assessment.”³²³ The three employees testified as to what the Department’s normal business practices were regarding the mailing of proposed assessments.³²⁴ The employees explained:

[W]hen a proposed assessment is printed, its print date is usually different from its issuance date because the Department’s computer system automatically assigns each assessment with an issuance date that is three to seven days beyond its print date. After the proposed assessment is printed, a copy of the original is made and is placed in the taxpayer’s file. The proposed assessment is then mailed.

. . . U-Haul Indiana’s 1999 proposed assessment was printed on December 19, 2002, and bore an issuance date of December 23, 2002. Furthermore, Ms. Hendy, the person responsible for mailing the 1999 proposed assessment, made a copy of the original and placed it in U-Haul Indiana’s file. Although Ms. Hendy did not recall actually placing the 1999 proposed assessment in the mail, she indicated that she must have because she had a copy of that assessment in her files and it was not returned in the mail.³²⁵

The Tax Court noted the general rule that “[e]vidence of the routine practice of an organization is relevant to prove that the conduct of the organization on a particular occasion was in conformity with the routine practice.”³²⁶ The Tax

317. *Id.* at 1255-56 (quoting IND. CODE § 6-8.1-5-2(a)(1) (2006)).

318. *Id.* at 1256.

319. *Id.*

320. *Id.*

321. *Id.*

322. *Id.*

323. *Id.*

324. *Id.*

325. *Id.* at 1256-57.

326. *Id.* at 1257 (citing IND. EVID. R. 406).

Court determined that the Department's evidence lead to "the reasonable inference that it timely mailed the 1999 proposed assessment."³²⁷ The Tax Court therefore reserved the issue of whether or not the 1999 proposed assessment was timely mailed for trial.³²⁸

b. The Department's change of interpretation.—For the taxable years in dispute, Indiana law stated that "[n]o change in the [D]epartment's interpretation of a listed tax may take effect before the date the change is . . . adopted in a rule . . . or published in the Indiana Register . . . if the change would increase a taxpayer's liability for a listed tax."³²⁹ U-Haul Indiana claimed specifically that the Department's 2006 Letter of Findings was in direct opposition to its 1986 Letter of Findings.³³⁰ In the 1986 Letter of Findings, the Department determined that "U-Haul Leasing was not subject to gross income tax."³³¹

The Department admitted to changing its position with respect to its interpretation of the listed tax.³³² However, the Department claimed that its change in interpretation was permissible under the Indiana Administrative Code because U-Haul Indiana had "omitted a material fact and asserted materially different facts" from the facts which the Department relied upon in the 1986 Letter of Findings.³³³ The Department alternatively argued that a change in its interpretation was permitted due to changes in applicable case law.³³⁴

The Department argued that "U-Haul Indiana had withheld the fact that the Rental Companies were agents of UHI for over twenty years."³³⁵ The Department supported this claim by referencing five Letters of Findings issued between 1980 and 1997 which lacked any reference to an agency relationship.³³⁶ U-Haul Indiana responded to the Department's argument with a 1979 letter which discussed the agency relationship between the Rental Companies and UHI for almost eight pages.³³⁷ The Tax Court found, therefore, that the Department's change in interpretation of the listed tax, from its position in the 1986 Letter of Findings, was improper.³³⁸

The Department also claimed that the Tax Court's decision in *First National Leasing and Financial Corp. v. Indiana Department of State Revenue*³³⁹ in 1992 allowed the Department to change its position articulated in the 1986 Letter of

327. *Id.*

328. *Id.*

329. IND. CODE § 6-8.1-3-3(b) (2006).

330. *U-Haul*, 896 N.E.2d at 1257-58.

331. *Id.* at 1258.

332. *Id.*

333. *Id.* (citing 45 IND. ADMIN. CODE 15-3-2(d)(2) (West 2009)).

334. *Id.*

335. *Id.*

336. *Id.*

337. *Id.* at 1259.

338. *Id.*

339. 598 N.E.2d 640 (Ind. Tax Ct.1992).

Findings.³⁴⁰ The Department argued that *First National Leasing*: “[R]equired the Department to change its focus from the location of the taxpayer to the location of the critical transaction when determining whether a taxpayer has a tax situs within the state.”³⁴¹

The Tax Court noted, however, that before *First National Leasing* the Department was required “to focus upon the location of the critical transaction—the activity giving rise to the income—as opposed to the location of the taxpayer.”³⁴² Therefore, the Tax Court noted, “*First National Leasing* did not change Indiana law.”³⁴³ The Tax Court, therefore, rejected the Department’s argument that the Department was permitted to change its interpretation from the 1986 Letter of Findings because applicable case law had changed Indiana law.³⁴⁴

C. Property Tax Cases

1. *Izaak Walton League of America v. Lake County Property Tax Assessment Board of Appeals*.—In *IWL*, the issue before the Tax Court was whether the Izaak Walton League of America (IWL) was entitled to a charitable purposes exemption from the real property tax, with respect to 30 acres of wetlands and water which IWL owned and maintained in Lake County, Indiana.³⁴⁵

As a not-for-profit organization, IWL dedicated itself, “to the preservation of natural resources within the United States and educating the public with respect to utilizing and enjoying those natural resources.”³⁴⁶ IWL claimed that the thirty acres of wetlands and water which IWL owned was entitled to an exemption from Indiana’s property tax because such property was used for a charitable purpose.³⁴⁷ IWL supported its position with two arguments: (1) that the property was exempt through IC 6-1.1-10-16(c)(3), and (2) that the property was entitled to an exemption on equitable grounds.³⁴⁸

In resolving whether or not IWL’s property was entitled to an exemption from the property tax, the Tax Court discussed Indiana’s property tax scheme.³⁴⁹ The Tax Court noted that all tangible property is subject to property taxation in the State of Indiana.³⁵⁰ However, the Indiana constitution provides that the Indiana general assembly may exempt from property taxation any property,

340. *U-Haul*, 896 N.E.2d at 1259.

341. *Id.*

342. *Id.*

343. *Id.*

344. *Id.* at 1260.

345. *Izaak Walton League of Am. v. Lake County Prop. Tax Assessment Bd. of Appeals*, 881 N.E.2d 737, 739 (Ind. Tax Ct. 2008).

346. *Id.*

347. *Id.* at 740.

348. *Id.*

349. *Id.*

350. *Id.*

“being used for municipal, educational, literary, scientific, religious, or charitable purposes”³⁵¹ and through its constitutional authority, the Indiana General Assembly enacted IC 6-1.1-10-16(d) which provides that all, or part, of a building is exempt from property taxation if the property is used for charitable purposes and if certain other conditions are met.³⁵²

IWL relied on IC 6-1.1-10-16(c), which, as amended by the Indiana General Assembly in 2003, states that land would be exempt if the land were: “[O]wned by a nonprofit entity established for the purpose of retaining and preserving land and water for their natural characteristics . . . [provided the land] does not exceed five hundred (500) acres[] and is not used by the nonprofit to make a profit.”³⁵³

In denying IWL’s exemption request, both the Lake County PTABOA and the IBTR relied on the 2000 version of IC 6-1.1-10-16.³⁵⁴ Under the 2000 version of IC 6-1.1-10-16(d), the IBTR determined that an exemption was not proper.³⁵⁵ Therefore, the specific question before the Tax Court was whether the 2000 or 2003 version of IC 6-1.1-10-16 applied to IWL’s exemption request.

IWL argued that the 2003 version of IC 6-1.1-10-16 applied because when the PTABOA issued its denial in 2004 the 2003 version was in effect.³⁵⁶ The Tax Court, however, determined that IWL was incorrect in relying on the 2003 version of the statute.³⁵⁷ The Tax Court stated: “Statutes and statutory amendments are to be given prospective effect only, unless the legislature has unambiguously and unequivocally intended retroactive effect as well.”³⁵⁸ As the party seeking an exemption, IWL had the burden of showing that the 2003 statute was to have retroactive effect.³⁵⁹ IWL sought to meet its burden through the text of a 2005 non-code section.³⁶⁰ The Tax Court, however, determined that IWL did not comply with the requirement of the non-code provision.³⁶¹ Under subsection (c) of the non-code provision, IWL was required to file two separate exemption applications.³⁶² Because IWL did not comply with the statutory procedures for obtaining an exemption, the Tax Court held that IWL had waived its right to an exemption.³⁶³

As stated previously, IWL also argued that it was entitled to an exemption on equitable grounds; specifically through the doctrines of legislative

351. *Id.* (quoting IND. CONST. art. 10, § 1(a)(1)).

352. *Id.*

353. *Id.* (quoting IND. CODE § 6-1.1-10-16(c)(3) (2006)).

354. *Id.*

355. *Id.*

356. *Id.* at 740-41.

357. *Id.* at 741.

358. *Id.*

359. *Id.*

360. *Id.*

361. *Id.* at 742.

362. *Id.* at 741-42.

363. *Id.* at 742.

acquiescence, equitable estoppel, and laches.³⁶⁴

Under the doctrine of legislative acquiescence, the Tax Court stated that IWL needed to show “(1) there is a longstanding administrative interpretation of ambiguous statutory language (2) to which the legislature is presumed to have acquiesced because it has not made a subsequent change to that statutory language.”³⁶⁵ The Tax Court disagreed with IWL’s argument. The Tax Court stated that, “[e]ven assuming the language of the 2000 version . . . was ambiguous, the non-code section specifically required a taxpayer like IWL to reapply for exemption.”³⁶⁶ Therefore, IWL’s argument based on the doctrine of legislative acquiescence failed.³⁶⁷

IWL also argued it was entitled to an exemption based on equitable estoppel.³⁶⁸ The Tax Court cited the elements of equitable estoppel as:

(1) a representation or concealment of material fact; (2) made by a person with knowledge of the fact and with the intention the other party act upon it; (3) to a party ignorant of the fact; (4) which induces the other party to rely or act upon it to his detriment.³⁶⁹

The Tax Court explained the general rule of equitable estoppel claims against government entities and its exception:

Equitable estoppel cannot ordinarily be applied against government entities. The reason for this general rule is twofold. If the government could be estopped, then dishonest, incompetent or negligent public officials could damage the interests of the public. At the same time, if the government were bound by its employees’ unauthorized representations, then government itself, could be precluded from functioning.

However, application of the doctrine against the government is not absolutely prohibited. The exception to the general rule exists where the public interest would be threatened by the government’s conduct.³⁷⁰

The Tax Court held that IWL had not met the elements of equitable estoppel or offered a public policy reason favoring, “estoppel sufficient to *counter and outweigh* the general rule as well.”³⁷¹

IWL’s last equitable argument was based on the doctrine of laches.³⁷² IWL

364. *Id.*

365. *Id.*

366. *Id.* at 743 (footnote omitted).

367. *Id.*

368. *Id.*

369. *Id.* (citing *Hi-Way Dispatch, Inc. v. Ind. Dep’t of State Revenue*, 756 N.E.2d 587, 598-99 (Ind. Tax Ct. 2001)).

370. *Id.* (citing *Hi-Way Dispatch*, 756 N.E.2d at 588-99).

371. *Id.* at 743 (emphasis added).

372. *Id.* at 744.

argued that the PTABOA should have denied IWL's exemption request prior to 2000, and therefore, had waived its right to deny the exemption request for the year at issue.³⁷³ The Tax Court noted that the Indiana Supreme Court had already rejected a laches argument with respect to the collection of taxes: "[T]he taxing authorities of the state . . . could not by failing to do their duty, or by any act or failure to act, waive the right and duty of the state to assess and collect taxes for the years following."³⁷⁴ By rejecting IWL's laches argument the court effectively held that IWL was not entitled to a charitable purposes exemption for the year at issue.³⁷⁵

2. Cedar Lake Conference Ass'n v. Lake County Property Tax Assessment Board of Appeals.³⁷⁶—In *Cedar Lake*, the question before the Tax Court was whether a not-for-profit corporation was entitled to a religious purposes exemption from Indiana's real property tax.³⁷⁷

Cedar Lake Conference Association (Cedar Lake) owned and operated the Cedar Lake Bible Conference Center RV Park and Campground in Cedar Lake, Indiana.³⁷⁸ Cedar Lake owned two adjacent parcels, totaling approximately 71 acres, 27.678 of which were in dispute.³⁷⁹ The disputed acres consisted of a "bathhouse, soccer fields, an archery range, walking trails, an RV park, campgrounds, and a prayer garden."³⁸⁰ Cedar Lake claimed it used the acres at issue "to promote Christian principles to youth and adults in a camp environment."³⁸¹

In determining whether the disputed acreage should be exempt from taxation, the Tax Court explained the Indiana General Assembly's authority to exempt certain real property from taxation through IC 6-1.1-10-16.³⁸² Under that code section, "[a]ll or part of a building is exempt from property taxation if it is owned, occupied, and used . . . for . . . religious . . . purposes."³⁸³ The Tax Court noted that the exemption would generally extend to the land on which the building was situated, as well as the personal property contained therein.³⁸⁴

Indiana law places the burden of proving an exemption on the taxpayer.³⁸⁵ Therefore, with respect to a property tax exemption, the taxpayer must present probative evidence during the administrative hearing "that not only demonstrates that it owns, occupies, and uses its property for an exempt purpose, but also that

373. *Id.*

374. *Id.* (quoting *Walgreen Co. v. Gross Income Tax Div.*, 75 N.E.2d 784, 787 (Ind. 1947)).

375. *Id.*

376. 887 N.E.2d 205 (Ind. Tax Ct.), *trans. denied*, 898 N.E.2d 1228 (Ind. 2008).

377. *Id.* at 206.

378. *Id.*

379. *Id.* at 206-07.

380. *Id.*

381. *Id.* at 207.

382. *Id.* at 207-08.

383. *Id.* (quoting IND. CODE § 6-1.1-10-16(a) (2006)).

384. *Id.*

385. *Id.*

the exempt purpose is the property's predominate use.³⁸⁶

In *Cedar Lake*, the IBTR did not dispute that Cedar Lake owned and occupied the disputed acreage for religious purposes.³⁸⁷ The IBTR, however, held that Cedar Lake failed to demonstrate that the disputed property "was predominately used for religious purposes."³⁸⁸ The IBTR defended its conclusion because Cedar Lake did not provide "documentation with a breakdown of the time spent on [] religious [] and . . . nonreligious activities."³⁸⁹ Before the Tax Court, Cedar Lake argued that the IBTR's decision was not supported by substantial evidence.³⁹⁰

To support its position, Cedar Lake pointed specifically to an "Affidavit of RV Park Use" and an "RV Park Income Report."³⁹¹ The Tax Court held that these documents "established that 67.2% of the RV Park's income was attributable to the property's use by 'affiliated' individuals and 32.8% of its income was attributable to the property's use by 'non-affiliated' individuals."³⁹² Therefore, the Tax Court found that the IBTR's decision was not supported by substantial evidence.³⁹³

Although some recreational activities took place on the disputed acreage, the Tax Court explained that such activities did not necessarily mean the use of the property was not in furtherance of religious purposes.³⁹⁴ Viewed in its entirety the Tax Court held the evidence and testimony proved that Cedar Lake predominately used the dispute acreage for religious purposes.³⁹⁵ Therefore, the IBTR's final determination was reversed and Cedar Lake was allowed a charitable exemption for the disputed acreage.³⁹⁶

D. Financial Institution Tax Cases

1. *MBNA America Bank v. Indiana Department of State Revenue*.³⁹⁷—In *MBNA*, the Tax Court was presented with the question of whether or not the Commerce Clause of the United States Constitution requires an out-of-state national bank to have a physical presence in the State of Indiana in order for it to be subject to the state Financial Institutions Tax (FIT).³⁹⁸

MBNA is a national bank whose principal place of business for the taxable

386. *Id.*

387. *Id.*

388. *Id.*

389. *Id.* (internal quotations omitted).

390. *Id.*

391. *Id.*

392. *Id.*

393. *Id.*

394. *Id.* at 209.

395. *Id.*

396. *Id.*

397. 895 N.E.2d 140 (Ind. Tax Ct. 2008).

398. *Id.* at 141.

years at issue was Delaware.³⁹⁹ MBNA had issued Visa and MasterCard credit cards to consumers throughout the State of Indiana.⁴⁰⁰ For the taxable years at issue, MBNA did not have any place of business within Indiana, nor did any MBNA employees enter the state on business.⁴⁰¹ Indiana consumers of MBNA's credit cards were solicited either through telephone or mail communications.⁴⁰² MBNA extended credit to Indiana consumers and collected interest and fees from them during the years in dispute.⁴⁰³

Based on the above facts, the Department sought payment of the state FIT from MBNA.⁴⁰⁴ MBNA paid the proposed FIT assessment in full and requested a refund for the amount paid.⁴⁰⁵ The Department denied MBNA's refund request.⁴⁰⁶

The Tax Court explained that the Commerce Clause prohibits states from imposing taxes on out-of-state businesses unless the business has a "substantial nexus" with the taxing state.⁴⁰⁷ Before the Tax Court, the Department argued that MBNA's "economic presence" in Indiana satisfied the Commerce Clause's "substantial nexus" requirement.⁴⁰⁸ It was MBNA's contention, however, that "economic presence" was not enough to satisfy the "substantial nexus" requirement.⁴⁰⁹ MBNA contended that it must have a physical presence in Indiana in order to be subject to the state FIT.⁴¹⁰ MBNA argued that the Department, in denying its refund request, ignored two important United States Supreme Court decisions.⁴¹¹ *National Bellas Hess v. Department of Revenue of Illinois*⁴¹² and *Quill Corp. v. North Dakota*.⁴¹³ In determining whether MBNA was subject to Indiana's FIT, the Tax Court had to determine whether the Supreme Court's decisions in *Bellas Hess* and *Quill* governed and, if not, whether MBNA's economic presence in Indiana created a substantial nexus under the Commerce Clause.⁴¹⁴

In *Bellas Hess*, the U.S. Supreme Court explained that an out-of-state vendor is not required to remit *use tax* when its only activity in the state is through the

399. *Id.*

400. *Id.*

401. *Id.*

402. *Id.*

403. *Id.*

404. *Id.*

405. *Id.*

406. *Id.*

407. *Id.*

408. *Id.* at 142.

409. *Id.*

410. *Id.*

411. *Id.*

412. 386 U.S. 753 (1967), *overruled in part by* *Quill Corp. v. N.D.*, 504 U.S. 298 (1992).

413. 504 U.S. 298 (1992).

414. *MBNA*, 895 N.E.2d at 142.

mail or common carrier.⁴¹⁵ The physical presence requirement, for the purposes of *sales and use taxes*, was reaffirmed by the Supreme Court in *Quill*.⁴¹⁶ Therefore, MBNA argued that *Bellas Hess* and *Quill* prohibited the State of Indiana from imposing FIT based solely on its economic presence within the State.

The Tax Court disagreed and stated:

[T]his Court finds that the Supreme Court has not extended the physical presence requirement beyond the realm of sales and use taxes. Thus, *Bellas Hess* and *Quill* do not control the outcome of this case. Accordingly, the Supreme Court has left the door open for this Court to determine, as a matter of first impression, whether an economic presence can also satisfy the substantial nexus requirement for purposes of the FIT.⁴¹⁷

Because it was a matter of first impression in Indiana, the Tax Court looked to other states that had already decided whether economic presence was sufficient to create a substantial nexus for taxes, other than sales or use taxes, under the Commerce Clause.⁴¹⁸ The Tax Court noted that two state courts had already analyzed whether the imposition of tax on the income of a company, “who issued credit cards in the taxing state, but did not have a physical presence therein” was allowed under the Commerce Clause.⁴¹⁹

In *J.C. Penney National Bank v. Johnson*,⁴²⁰ the Tennessee Court of Appeals determined that *Bellas Hess* and *Quill* governed and a franchise tax could not be imposed without the company’s physical presence in Tennessee.⁴²¹ In reaching its decision the Tennessee court stated that it was not within its duty to determine whether franchise or excise taxes should be treated any differently than sales or use taxes under the Commerce Clause.⁴²²

When confronted with the same question, however, the Supreme Court of West Virginia reached the opposite result.⁴²³ In *Tax Commissioner of West Virginia v. MBNA America Bank*,⁴²⁴ the Court stated that the physical presence requirement articulated in *Bellas Hess* and affirmed in *Quill* only applies to sales and use taxes.⁴²⁵

The Tax Court found the West Virginia Supreme Court’s reasoning

415. *Bellas Hess*, 386 US. at 757-58.

416. *Quill*, 504 U.S. at 316-17.

417. *MBNA*, 895 N.E.2d at 143.

418. *Id.*

419. *Id.*

420. 19 S.W.3d 831 (Tenn. Ct. App. 1999).

421. *Id.* at 839.

422. *Id.*

423. *See MBNA*, 895 N.E.2d at 143.

424. 640 S.E.2d 226 (W. Va. 2006), *cert. denied*, *FIA Card Servs. v. Tax Comm’r of W. Va.*, 127 S. Ct. 2997 (2007).

425. *Id.* at 232.

persuasive. The Tax Court noted the four reasons the West Virginia Court gave for reaching its conclusion: (1) *Quill*'s reaffirmation of the physical presence requirement articulated in *Bellas Hess* was really based on *stare decisis*, (2) *Quill* expressly limited its holding to sales and use taxes, (3) the collection of sales and use taxes places a greater burden on interstate commerce than what is required for franchise taxes, and (4) the physical presence test is a "poor measuring stick of an entity's true nexus with a state" with respect to franchise and income taxes.⁴²⁶

Therefore, the Tax Court adopted the reasoning of the West Virginia Supreme Court and held that MBNA's economic presence in Indiana created a substantial nexus within Indiana for purpose of the state FIT.⁴²⁷

E. State And Local Government Cases

1. *Perry v. Indiana Department of Local Government Finance*.⁴²⁸—In *Perry*, the Tax Court was presented with the question of whether the DLGF erred in approving emergency and equipment loans that had been passed in two resolutions authorizing Madison Township to incur indebtedness to support its firefighting operations.⁴²⁹

On March 21, 2007, the Madison Township Board (Board) authorized an emergency loan, "not to exceed \$700,000.00, in order to fund the fire department's operating expenses through the end of the year."⁴³⁰ Additionally, the Board authorized an equipment loan, "not to exceed \$650,000.00, so that the township could replace one of its two fire engines, replace one of its two ambulances, and purchase related equipment for those emergency vehicles."⁴³¹ On March 30, 2007, the Petitioners filed objections to the Board's activities with the Morgan County Auditor, stating the proposed loans were "unnecessary and unwise."⁴³²

After conducting two separate hearings on the objections, the DLGF approved both loans. The DLGF did, however, modify the amount of the emergency loan to \$409,000.⁴³³ On appeal of the DLGF's findings before the Tax Court, the Petitioners argued that the DLGF erred in approving the loan requests by ignoring "substantial evidence [demonstrating] that the loans constituted unnecessary expenditures."⁴³⁴ Specifically, Petitioners argued that no emergency existed which would require an emergency loan, and the equipment loan was unnecessary because the Board had not demonstrated a need

426. *MBNA*, 895 N.E.2d at 143-44 (quoting *Tax Comm'r*, 640 S.E.2d at 234).

427. *Id.* at 144.

428. 892 N.E.2d 1281 (Ind. Tax Ct. 2008).

429. *Id.* at 1282.

430. *Id.*

431. *Id.*

432. *Id.*

433. *Id.*

434. *Id.* at 1283.

for new equipment.⁴³⁵

a. *The emergency loan.*—Indiana law provides that, “[e]ach township shall annually establish a township firefighting fund which is to be the exclusive fund used by the township for the payment of costs attributable to providing fire protection or emergency services.”⁴³⁶ If, however, a township board determines that an emergency exists which will require the expenditure of additional funds not originally included in the budget estimate, “it may issue a special order . . . authorizing the executive to borrow a specified amount of money sufficient to meet the emergency.”⁴³⁷ The Indiana General Assembly has defined “emergency” as, “a situation that could not reasonably be foreseen and that threatens the public health, welfare, or safety and requires immediate action.”⁴³⁸

The Board authorized the emergency loan after concluding that the original budget was inadequate “to finance firefighters['] salaries, FICA, health insurance[,] and other essential operating expenses.”⁴³⁹ Petitioners argued that the township’s firefighting fund was insufficient to cover firefighting expenses due to the Board’s “poorly-timed” decision to transition the fire department from “paid stand-by” status to “career/full-time” status—not because of any ongoing emergency.⁴⁴⁰ Petitioners argued that the fire department had been adequately staffed under the paid stand-by system, and that there was nothing to suggest continuing to operate under the same system would pose “an immediate threat to the public’s safety.”⁴⁴¹

At the hearing before the DLGF, the Madison Township fire chief articulated why the original 2007 firefighting budget was inadequate:

First, at four personnel per station per day, the fire stations were understaffed, pursuant to federal guidelines, for fighting fires. Second, given that the number of home-response volunteer firefighters has been gradually decreasing over the years (consistent with a national trend), the fire department must hire career firefighters to fill that void in manpower; offering career firefighters “paid stand-by” is not a competitive wage. Third, because the number of emergency medical runs within the township increased nearly 300% between 2000 and 2006, a second paramedic must be hired. Finally, Madison Township has seen exponential population growth over the last five years and there is no expectation that the growth will cease.⁴⁴²

Supported by the above evidence, the Tax Court held that the DLGF did not err in approving the emergency loan. The Tax Court stated:

435. *Id.*

436. IND. CODE § 36-8-13-4(a) (2007 & Supp. 2008).

437. *Id.* § 36-6-6-14(b).

438. *Id.* § 36-1-2-4.5.

439. *Perry*, 892 N.E.2d at 1283.

440. *Id.* at 1283-84.

441. *Id.* at 1284.

442. *Id.* at 1284-85 (internal citations omitted).

The decision as to how to best provide firefighting services within the township is one that properly lies with the local fire department and the Board. Consequently, they have a great deal of discretion in implementing policies that best meet the needs of the citizens of the township as a whole.⁴⁴³

b. The equipment loan.—Indiana law authorizes a township to “[p]urchase firefighting and emergency services apparatus and equipment for the township . . . to provide services within the township.”⁴⁴⁴ Petitioner argued that the Board overstepped its authority in purchasing new fire equipment.⁴⁴⁵ Petitioners contended that the Board merely *wanted* the equipment, and did not demonstrate that the department needed the equipment to adequately protect township citizens.⁴⁴⁶

The Tax Court, however, found that the Board did demonstrate a need for new equipment within the fire department.⁴⁴⁷ Before the DLGF the Board presented evidence that the proceeds of the equipment loan would be spent to replace a fire engine which was one year away from its life expectancy.⁴⁴⁸ The engine cost the township “\$20,000 annually in repairs and maintenance and was actually out of service for 87 days in 2006 due to repairs.”⁴⁴⁹ The Board also presented evidence demonstrating a need to replace a ten-year old ambulance with 117,000 miles on it.⁴⁵⁰ The ambulance cost \$10,000 annually to maintain.⁴⁵¹ The Madison Township fire chief explained “that the great population growth in Madison Township, the ‘run load’ of the fire engines has doubled within the last couple of years, and the training hours on those vehicles has quadrupled. Similarly, the number of ambulance runs has tripled since 2000.”⁴⁵²

The Tax Court held that a “reasonable mind” would accept this evidence as adequate to support the DLGF’s finding that Madison Township needed new firefighting equipment.⁴⁵³

2. *Clark-Pleasant Community School Corp. v. Department of Local Government Finance.*⁴⁵⁴—In *Clark-Pleasant*, the Tax Court was presented with the question of whether the DLGF’s rejection of a lease agreement between the Clark-Pleasant Community School Corporation (School Corporation) and the Clark Pleasant Middle School Building Corporation (Building Corporation) was

443. *Id.* at 1285.

444. IND. CODE § 36-8-13-3(a)(1) (2007 & Supp. 2008).

445. *Perry*, 892 N.E.2d at 1285.

446. *Id.*

447. *Id.*

448. *Id.*

449. *Id.*

450. *Id.* at 1285-86.

451. *Id.* at 1286.

452. *Id.* (internal citations omitted).

453. *Id.*

454. 899 N.E.2d 762 (Ind. Tax Ct. 2008).

an abuse of discretion.⁴⁵⁵

The School Corporation was located in Johnson County, Indiana.⁴⁵⁶ Beginning in 2005, the School Corporation's overcrowded high school began using portable classrooms to accommodate student needs.⁴⁵⁷ The School Corporation projected its total enrollment (comprised of one high school, one middle school, one intermediate school, and four elementary schools) to increase by another "350 to 400 new students per year for the next ten years."⁴⁵⁸ Based on this projection, the School Corporation commissioned a task force comprising both school staff and members of the community to develop a construction plan that would accommodate the School Corporation's growth.⁴⁵⁹ The task force met twenty-two times and the School Corporation conducted six public forums to gather input on how to best handle the situation.⁴⁶⁰ The School Corporation ultimately decided to convert some of its buildings, renovate others, and construct a new middle school in order to meet the district's needs.⁴⁶¹ The School Corporation proposed to spend \$60,000,000 to make the changes.⁴⁶²

The School Corporation conducted a public hearing on the proposed changes, at which time, two people spoke out against the project.⁴⁶³ The School Corporation voted unanimously to proceed with the changes.⁴⁶⁴ A remonstrance was attempted by those opposed to the project, but the process failed.⁴⁶⁵ The School Corporation then decided to move forward with its changes, and entered into a lease agreement, whereby the School Corporation would pay the Building Corporation an annual rental payment for twenty-seven years.⁴⁶⁶ The School Corporation petitioned the DLGF to approve the lease agreement. Upon receipt, the DLGF referred the petition to the School Property Tax Control Board for its recommendation.⁴⁶⁷

The School Property Tax Control Board conducted a hearing on the matter in which both opponents and proponents of the lease agreement were heard.⁴⁶⁸ The School Property Tax Control Board ultimately recommended that the DLGF approve the lease.⁴⁶⁹

The Commissioner of the DLGF then sent letters to each member of the

455. *Id.* at 765.

456. *Id.* at 763.

457. *Id.*

458. *Id.*

459. *Id.*

460. *Id.*

461. *Id.*

462. *Id.*

463. *Id.*

464. *Id.*

465. *Id.* at 764.

466. *Id.*

467. *Id.*

468. *Id.*

469. *Id.*

School Corporation's board.⁴⁷⁰ In the letters, the board members were urged to meet with the remonstrators "to bridge the gap" of disagreement.⁴⁷¹ However, the School Corporation did not do so.⁴⁷² Shortly thereafter the DLGF rejected the lease agreement between School Corporation and Building Corporation.⁴⁷³

Before the Tax Court, the School Corporation argued that the DLGF's decision to reject the lease agreement was "not supported by the evidence" and therefore constituted an abuse of discretion.⁴⁷⁴ The DLGF argued that it "was within its statutory discretion to deny" the lease agreement.⁴⁷⁵

The Tax Court noted that "[w]hen the DLGF reviews school construction projects, it does so as a tax specialist."⁴⁷⁶ The Tax Court explained that the function of the DLGF is "not to pass judgment on how a school corporation chooses to educate its students" but rather the DLGF should analyze the need for "capital construction in light of its chosen educational programs and policies."⁴⁷⁷ The DLGF, the Tax Court explained, is required to consider several factors when determining whether or not to approve a project:

- (1) The current and proposed square footage of school building space per student.
- (2) Enrollment patterns within the school corporation.
- (3) The age and condition of the current school facilities.
- (4) The cost per square foot of the school building construction project.
- (5) The effect that completion of the school building construction project would have on the school corporation's tax rate.
- (6) Any other pertinent matter.⁴⁷⁸

The Tax Court found that the School Corporation presented, to both the public and the School Property Tax Control Board, evidence addressing each of the factors.⁴⁷⁹ The Tax Court concluded that the DLGF had denied the lease for four reasons:

- (1) the cost of [the construction] was too high compared to other

470. *Id.*

471. *Id.*

472. *Id.*

473. *Id.*

474. *Id.* at 765.

475. *Id.*

476. *Id.* at 764.

477. *Id.*

478. *Id.* at 765. (citing IND. CODE § 20-46-7-11 (2007 & Supp. 2008)).

479. *Id.*

projects;

(2) the growth in the new home construction market was slower than anticipated;

(3) the school district's current tax rate is too high; and

(4) the School Corporation did not modify the proposed project to address the remonstrators' concerns.⁴⁸⁰

The Tax Court held, however, that none of the DLGF's four reasons were supported by the evidence.⁴⁸¹

To reach its conclusion that the cost of the proposed project was too high, the DLGF looked at only four other middle schools built in 2007. The Tax Court held that such a comparison, "without any further explanation," did not allow for the conclusion the DLGF reached.⁴⁸² The Tax Court also stated that the DLGF improperly relied on a newspaper article to determine that the growth of the new home market was slower than the School Corporation anticipated.⁴⁸³ The Tax Court noted that evidence that new homes may be built at a slower than expected pace did not "rebut the School Corporation's evidence that enrollment is still projected to increase."⁴⁸⁴ The Tax Court additionally noted that the DLGF had determined that the school district's tax rate was too high without providing "an accurate comparison" of other tax rates.⁴⁸⁵ Finally, the DLGF "went too far" in basing its decision to deny the lease agreement because the School Corporation did not adhere to the Commissioner's request and "bridge the gap" of disagreement with the remonstrators.⁴⁸⁶

The Tax Court stated that it "will give deference to whatever factor or reason the DLGF bases its final determination on as long as the DLGF's reasoning is supported by substantial evidence."⁴⁸⁷ The Tax Court explained that "substantial evidence" is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion"⁴⁸⁸ and held that the DLGF's decision to deny the project proposal was not supported by substantial evidence.⁴⁸⁹ Therefore, the Tax Court remanded the case to the DLGF for a final determination consistent with its holding.⁴⁹⁰

480. *Id.* at 767.

481. *Id.*

482. *Id.*

483. *Id.*

484. *Id.*

485. *Id.* at 768.

486. *Id.*

487. *Id.* at 765.

488. *Id.* (quoting *Amax Inc. v. State Bd. of Tax Comm'rs*, 552 N.E.2d 850, 852 (Ind. Tax Ct. 1990)).

489. *Id.* at 769.

490. *Id.*

F. Inheritance Tax Cases

1. *Indiana Department of State Revenue, Inheritance Tax Division v. Miller (Miller I)*.⁴⁹¹—In *Miller I*, the Tax Court was presented with the question of whether or not the Vanderburgh Superior Court (probate court) abused its discretion in granting the Department's motion for extension of time to file its notice of appeal from the probate court's decision.⁴⁹²

On February 2, 2000, Virgil Miller passed away.⁴⁹³ On October 6, 2000, his "Estate filed an Indiana inheritance tax return with the probate court reporting that no inheritance tax was due."⁴⁹⁴ On October 25, 2000, the probate court issued an order accepting the Estate's inheritance tax return.⁴⁹⁵ The Department filed a "Petition for Rehearing, Reappraisal and Redetermination of Inheritance and Transfer Tax" (Department's Petition) alleging that the Estate actually owed \$200,000 of inheritance taxes as a result of an improper distribution of certain trust assets.⁴⁹⁶ The probate court held a hearing on April 25, 2006, in which it was determined that the assets in dispute had been properly distributed by the Estate.⁴⁹⁷ The probate court, therefore, denied the Department's Petition.⁴⁹⁸

Also, on April 25, 2006, the probate court requested that the estate prepare an entry "reflecting its statement and submit that entry to the Department for its review."⁴⁹⁹ The clerk of the probate court made a record of the hearing on the Chronological Case Summary (CCS).⁵⁰⁰ On May 1, 2006, the Department received the estate's proposed entry, "and had no objections thereto."⁵⁰¹ On May 3, 2006, the proposed entry was approved and signed by the probate court.⁵⁰² However, the probate court's CCS failed to indicate that the clerk "mailed a copy of the signed entry to either the Estate or the Department."⁵⁰³

On June 20, 2006, the Department's counsel telephoned the probate court and learned that the entry had been approved and signed on May 3, 2006.⁵⁰⁴ On June 21, 2006, the Department requested an extension to file a notice of appeal of the probate court's determination on the basis that it never received the signed

491. 894 N.E.2d 286 (Ind. Tax Ct.), *reh'g granted*, 897 N.E.2d 545 (Ind. Tax Ct. 2008), *trans. denied*.

492. *Id.* at 287.

493. *Id.*

494. *Id.* at 287-88.

495. *Id.* at 288.

496. *Id.*

497. *Id.*

498. *Id.*

499. *Id.*

500. *Id.*

501. *Id.*

502. *Id.*

503. *Id.*

504. *Id.*

entry of May 3, 2006.⁵⁰⁵ On June 27, 2006, the probate court granted the Department's request.⁵⁰⁶ The Estate then filed a "Motion to Correct Error," which the probate court subsequently denied.⁵⁰⁷

The Tax Court reviewed the probate court's decision with respect to the application of Trial Rule 72(E) under an "abuse of discretion" standard and noted the general rule with respect to the time frame that a losing party has in order to appeal a probate court's final judgment concerning inheritance tax.⁵⁰⁸ The Tax Court stated that the losing party must file: "[A] Notice of Appeal with the [probate] court clerk within thirty (30) days after the entry of a Final Judgment."⁵⁰⁹ The Tax Court further noted that a losing party's failure to file a notice of appeal within thirty days does not necessarily preclude a right to appeal.⁵¹⁰ Under Indiana Trial Rule 72(E), a party may be allowed additional time to perfect an appeal:

When the mailing of a copy of the entry by the Clerk is not evidenced by a note made by the Clerk upon the [CCS], the Court, upon application for good cause shown, may grant an extension of any time limitation within which to contest such ruling, order or judgment to any party who was *without actual knowledge*.⁵¹¹

Therefore, through Trial Rule 72(E), additional time to appeal is not granted when the CCS indicated that notice was mailed or when the losing party had actual knowledge of the court's ruling.⁵¹² The estate argued that the Department obtained actual knowledge of the court's ruling when the probate court orally rendered the judgment at the April 25, 2006 hearing.⁵¹³ The Department argued that the decision of the probate court did not become final until the court signed the judgment on June 20, 2006.⁵¹⁴ Thus, the Tax Court had to determine whether the probate court issued a final judgment at the April 25, 2006 hearing, and if so, whether the Department had actual knowledge of the judgment sufficient to preclude additional time to appeal under Trial Rule 72(E).⁵¹⁵

In determining whether the probate court disposed of all the claims to all the parties at the April 25, 2006 hearing, the Tax Court found the following exchange instructive:

[COURT]: I don't see any reason to . . . set aside the distribution or the

505. *Id.*

506. *Id.*

507. *Id.*

508. *Id.*

509. IND. APP. R. 9(A)(1).

510. *Miller I*, 894 N.E.2d at 289.

511. IND. TRIAL R. 72(E).

512. *See id.*

513. *Miller I*, 894 N.E.2d at 289.

514. *Id.*

515. *Id.*

work that was done We'll show that the State's [Petition] is denied. Show that the . . . Trusts were properly handled, . . . and distribution made. How long will it take you [to] close this Estate up, do you think?

[ESTATE]: I'm not sure what all else would be involved. I'm not sure I'm understanding your question, sir.

[COURT]: Oh, I guess you have the right to appeal this decision if you wish to.

[DEPARTMENT]: Yes.

[COURT]: Are you planning to do that?

[DEPARTMENT]: Yes, Your Honor.

[COURT]: Okay we'll show the appeal . . . how much time do you need for the appeal?

[DEPARTMENT]: Uh, I would . . . I would get the, uh, notice of appeal in within thirty days, Your Honor.

[COURT]: That's fine. Okay, anything else? Will you prepare the entry, then?

[ESTATE]: Sure. Yes, Your Honor.⁵¹⁶

The Tax Court found that the above exchange evidenced that the probate court rendered a final judgment at the April 25, 2006 hearing because: (1) the issue of whether or not the trust assets were properly distributed was decided, (2) the Department indicated it wished to appeal the decision, (3) when asked if there were any additional issues for the probate court to consider neither party raised another issue, (4) the estate was asked to prepare an entry of the decision, and (5) on April 25, 2006, the clerk of the probate court entered a notation in the CCS stating that the Department's Petition had been denied by the probate court.⁵¹⁷

The Tax Court also held that the Department had actual knowledge of the April 25, 2006 final judgment.⁵¹⁸ Therefore, the probate court abused its discretion under Trial Rule 72(E) to grant the Department additional time to file its appeal and the Tax Court dismissed the Department's appeal.⁵¹⁹

2. Indiana Department of State Revenue, Inheritance Tax Division v. Miller

516. *Id.* at 289-90.

517. *Id.* at 290.

518. *Id.* at 290-91.

519. *Id.* at 291.

(*Miller II*).⁵²⁰—In *Miller II*, the Tax Court considered the Department's Petition for Rehearing with respect to the Tax Court's prior opinion issued on October 6, 2008.⁵²¹ In *Miller II*, the Tax Court affirmed the prior opinion, *Miller I*, in its entirety.⁵²²

In *Miller I*, the Tax Court found that the probate court abused its discretion in granting the Department additional time to file a notice of appeal under Indiana Trial Rule 72(E), when the Department had actual knowledge of the final judgment prior to requesting an extension.⁵²³ *Miller I* was issued on October 6, 2008.⁵²⁴ On November 5, 2008, the Department filed a petition for rehearing asserting, as it did in *Miller I*, that the Department did not have actual knowledge of the probate court's final judgment rendered on April 25, 2006, because the judgment was not reduced to writing and signed by the probate court on that date.⁵²⁵ The Department's petition for rehearing also claimed that *Miller I* "not only alters the manner in which appeals were commenced but also conflicts with *Collins v. Covenant Mutual Insurance Co.*"⁵²⁶

The Tax Court noted that a proper petition for rehearing affords the court the "opportunity to correct its own omissions or errors."⁵²⁷ A petition for rehearing is not supposed to ask the court to simply re-examine the issues which were decided against the party filing the petition.⁵²⁸ Therefore, the Tax Court denied the Department's petition with respect to its first claim, because the Department simply asked the court to re-examine the issues decided against it in *Miller I*.⁵²⁹

The Tax Court granted the Department's petition for rehearing "for the sole purpose of clarifying" *Miller I*.⁵³⁰ In its petition, the Department claimed that *Miller I* altered "the manner by which the appellate time clock commences."⁵³¹ The Department claimed that post-*Miller I* the rendering of an oral judgment would trigger the appellate time clock.⁵³² The Tax Court found, however, that the Department confused the issue decided in *Miller I*.⁵³³ The Tax Court noted that "the time to initiate an appeal usually commences when the ruling, order, or judgment is entered into the [Record of Judgments and Orders (RJO)]."⁵³⁴ The Tax Court explained further:

520. 897 N.E.2d 545 (Ind. Tax Ct. 2008), *trans. denied*.

521. *Id.* at 545-46.

522. *Id.* at 547.

523. *Id.* at 545.

524. *Id.*

525. *Id.* at 545-46.

526. *Id.* at 546 (citing *Collins v. Covenant Mut. Ins. Co.*, 644 N.E.2d 116 (Ind. 1994)).

527. *Id.* (quoting *Griffin v. State*, 763 N.E.2d 450, 450-51 (Ind. 2002)).

528. *Id.* (citing *Griffin*, 763 N.E.2d at 450-51).

529. *Id.*

530. *Id.*

531. *Id.*

532. *Id.*

533. *Id.*

534. *Id.* (citing *Smith v. Deem*, 834 N.E.2d 1100, 1109-10 (Ind. Ct. App. 2005)).

The issue of when the Department's period for filing its notice of appeal commenced, however, was not the issue that the Estate presented to this Court on cross-appeal. Rather, the issue the Estate presented to this Court on cross-appeal was whether the probate court properly granted the Department additional time to file its notice of appeal despite the fact that it had obtained actual knowledge of the judgment before it was entered into the RJO.⁵³⁵

Because the Tax Court treated the issues separately in *Miller I*, and only considered whether additional time was proper, *Miller I* did not alter the manner in which the appellate time clock commences.⁵³⁶

The Tax Court also disagreed with the Department's argument that *Miller I* conflicted with *Collins*.⁵³⁷ *Collins* established that Indiana Trial Rule 72(E) was the "sole vehicle" for a party to obtain an extension of time to file a notice of appeal.⁵³⁸ The Department argued that all it was required to show under *Collins* is that the probate court's CCS did not show that the judgment had been mailed to the Department.⁵³⁹ The Tax Court said:

[T]he Department's construction of Indiana Trial Rule 72(E) invites the Court to ignore the portions of the Rule referring to good cause, lack of actual knowledge of the judgment, and reliance upon incorrect representations by Court personnel. Those portions of the Rule reflect what the Rule intends to prevent—the "forfeiture of appellate rights due to expiration of time caused by [an] attorney's *ignorance of the existence of a ruling or order*."⁵⁴⁰

Because the *Miller I* court determined that the Department had actual knowledge of the judgment of the probate court, the Tax Court rejected the Department's interpretation of Trial Rule 72(E).⁵⁴¹

535. *Id.*

536. *Id.*

537. *Id.* at 547.

538. *Id.* (citing *Collins v. Covenant Mut. Ins. Co.*, 644 N.E.2d 116, 117 (Ind. 1994)).

539. *Id.*

540. *Id.* (quoting *Markle v. Ind. State Teachers Ass'n*, 514 N.E.2d 612, 613 (Ind. 1987)).

541. *Id.*



